DOCUMENT RESUME

ED 362 777 CE 064 999

TITLE	B-WEST Regional Workforce Training Center. Building Workers Entering Skilled Trades. Employer Training Guide.
INSTITUTION	Portland Community Coll., Oreg.
SPONS AGENCY	Office of Vocational and Adult Education (ED), Washington, DC.
PUB DATE	31 Aug 93
CONTRACT	V199C10008-91
NOTE	128p.; For related documents, see CE 064 997-CE 065 001.
PUB TYPE	Guides - Non-Classroom Use (055)
EDRS PRICE	MF01/PC06 Plus Postage.
DESCRIPTORS	Adult Education; *Building Trades; *Cultural Differences; *Employer Employee Relationship; Inservice Education; *Management Development; *Personnel Management; Program Implementation; *Sexual Harassment; Skilled Occupations; Vocational Education
IDENTIFIERS	Building Workers Entering Skilled Trades Project

ABSTRACT

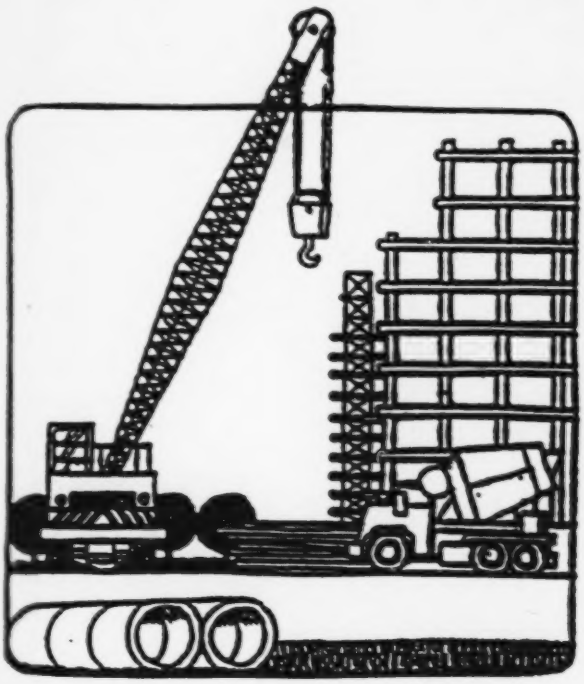
This guide, which was developed during the B-WEST (Building Workers Entering Skilled Trades) project, includes materials for use in training and providing on-site consultations to contractors, managers, supervisors, office/technical staff, and others in two areas: diversity in the workplace and sexual harassment in the workplace. Part 1, which deals with managing a diverse work force, is divided into two sections. The first section includes the agenda and instructional materials for a presentation on what managing diversity entails, values that shape attitudes toward business and work, work force issues, the changing business climate, and sensitive issues in the workplace, and the second section contains a workshop plan and handouts from a published training guide. The first half of Part 2 consists of text, a 33-item bibliography, and a sexual harassment awareness test excerpted from a published training guide; the second half consists of excerpts from a 1992 employer's guide to preventing sexual harassment that was developed by Oregon's Governor's Office of Affirmative Action and Executive Department. Included in the guide are the following: prevention program components; sample policies and procedures; and information on employer liability, supervisor and manager obligations, retaliation, handling complaints, and Equal Employment Opportunity Commission guidelines. (MN)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED 362 777

B-WEST Regional Workforce Training Center

Building Workers Entering Skilled Trades



Employer Training Guide

Submitted to the U.S. Department of Education
August 31, 1993

Portland Community College

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

CE 064 999

BEST COPY AVAILABLE

B-WEST (Building Workers Entering Skilled Trades)
MANAGING A DIVERSE WORKFORCE TRAINING PROGRAM

A guide for diversity training and on-site consulting for contractors, managers, project managers, supervisors, office/technical staff and the field workforce in the areas of:

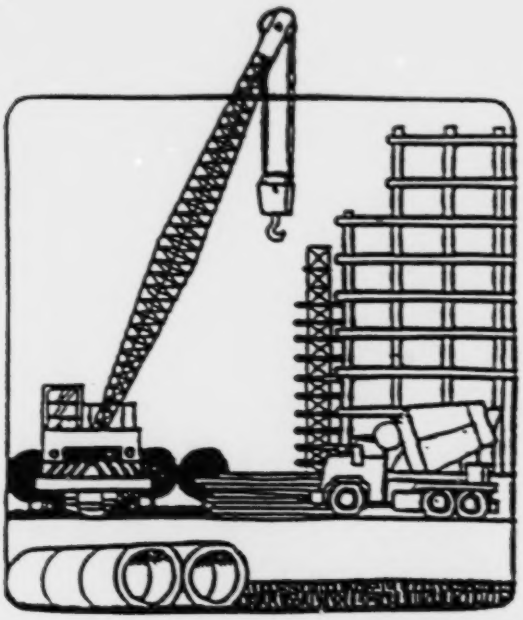
Diversity in the Workplace and
Sexual Harassment in the Workplace

Samples and sources of the materials used in training and consulting are included.

B-WEST
(Building Workers Entering Skilled Trades)

REGIONAL TRAINING CENTER

MANAGING A DIVERSE WORKFORCE TRAINING PROGRAM



Portland Community College
Rock Creek Campus

An Affirmative Action Equal Opportunity Institution

AGENDA

Managing a Changing Workforce

- **Introduction**
- **What Managing Diversity is NOT**
- **What Managing Diversity IS**
- **Discussion of *values* that shape the attitude toward business and work**
- **Workforce 2000 issues**
- **The change in the American business climate**
- **Sensitive issues in the workplace**
- **Questions and answers**

MANAGING A CHANGING WORKFORCE

INSTRUCTIONAL GOALS:

As managers, supervisors, and subordinates we each experience the change in the growing diversification of the workforce. As diverse groups continue to increase in the state and the nation, our awareness of *DIVERSITY* issues becomes critical. Misunderstanding across cultures could affect the quality output of our products, group morale, motivation, and the strengths of our working teams.

This presentation will provide the participant with communication awareness on *managing the changing workforce.* Real experiences on the subject will be shared by the presenter.

What Managing Diversity is NOT

- **A replacement or a substitute for affirmative action.**

- **A special program to make majority males feel guilty**

- **Developing women or minorities at expense of majority males**

- **A short-term strategy or option**

.....

WHAT MANAGING DIVERSITY IS

- Reaching organizational objectives by maximizing the contributions of individuals from every segment of our employee population

We need to start looking where we have come from so we can understand where we are going. This is necessary in order to make the necessary behavior changes needed to succeed in a diverse world.

Materials may be used by B-WEST with the express permission from Universal Business (503) 293-2244

HISTORICAL DATA:

1960-1975
LEGAL ISSUES

- SOCIETY WAS DIVIDED
- SOCIAL UNREST
- SPONSORSHIP LEGISLATED
- MAJORITY WAS MAJORITY
- CULTURAL AWARENESS

1975-1989
MORAL ISSUES

- BOTTOM-LINE ORIENTATION
- MISTRUST IN ORGANIZATION
- A DIVIDED WORKFORCE
- INCREASE IN WOMEN AND MINORITIES
- CULTURAL SENSITIVITY

Materials may be used by B-WEST with the express permission from Universal Business (503) 293-2244

1989-2000
SURVIVAL ISSUES

- GLOBAL COMPETITION
- DIVERSIFIED WORK FORCE
- NEED FOR CULTURAL TEAMS
- COMPETITION FOR BEST TALENT
- CULTURAL MAXIMIZATION

CHANGES PREDICTED YEAR 2000

- TECHNOLOGY
- PRODUCTIVITY
- COMPETITION
- GLOBALIZATION
- ORGANIZATION
- PEOPLE

Materials may be used by B-WEST with the express permission from Universal Business (503) 293-2244

WORKFORCE 2000

The understanding and solutions applied to the following areas will dictate the success of businesses:

Technology - Rapid growth, affecting personal and professional life.

Productivity - Must improve. Through training, strategic planning, policies, systems, and procedures to support employees needs.

Competition - World wide has increased. We need to possess better professional and educational skills.

Globalization - This is a reality of our marketplace. More countries have entered the business world. This reality requires more attention.

Organizations - Streamline and flattened. Middle managers are being eliminated. Some organizations have empowered their people to make contributions directly.

People - Greatest asset of any organization. Without their full cooperation an organization can not meet the daily and market challenges. Managing and understanding diversity becomes critical to move the organization to a competitive performance.

"CHANGE is the law of life, and those who look only to the past or the present are certain to miss the future."

John F. Kennedy

Materials may be used by B-WEST with the express permission from Universal Business (503) 293-2244

EXECUTIVE INVOLVEMENT

- Ensure that valuing diversity is integral part of the organization
- Are active mentors and role models
- Uses behaviors that reinforce commitment to valuing and managing diversity
- Communicate the culture of the organization

PERSONNEL SYSTEMS

- Develop, update policies and procedures in an on-going basis to meet current employee needs
- Ensure that efficient procedures are being used
- Obtain feedback from employees on policies, procedures, and practices
- Create a communication climate to explore new opportunities/ideas

MANAGEMENT SKILLS AND BEHAVIOR

- Employee development becomes a critical element in the job of a manager
- Managers need to demonstrate sensitivity towards peoples differences

Materials may be used by B-WEST with the express permission from Universal Business (503) 293-2244

- Understand the coaching role. Managers tend not to coach due to: do not want be sued, do not have the skills, can not see the priority, do not want to deal with emotional responses and do not understand the importance

- Managers need to utilize effective communication skills to bridge the trust gap and create a personal comfort level

POSSIBLE COMMUNICATION BARRIERS

- Values
- Culture
- Gender
- Age
- Religion
- Status
- Personal Experiences
- Language
- Sexual Orientation
- Job Function
- Trust

Materials may be used by B-WEST with the express permission from Universal Business (503) 293-2244

- Managers need to determine cultural differences communicated through nonverbal messages:

  - eye contact
  - time relationship
  - touching
  - personal space
  - social status

- Share the unwritten expectations of the organization that impact career success.

- Managers need to know legal framework around diverse issues

VALUES

White American value system evolved from three major European immigration waves occurring from the 17th-20th centuries. This represents mainstream male U.S. culture today.

Over seventy seven percent of people of European origin have been in the United States for three or more generations. Close to five percent of the population considers itself "American", and do not claim foreign ancestry, and ninety eight percent of these individuals have resided in the U.S. for more than three generations. Close to 3.5 percent consider themselves "white", "North American", or of "U.S." origin. [The above is based on the 1970 and 1980 census data.]

Materials may be used by B-WEST with the express permission from Universal Business (503) 293-2244

Some American Values

- **Time**
- **Activity**
- **Self**
- **Society**
- **Equality**
- **World View**

HISPANIC VALUE SYSTEM ORIENTATION

Hispanic-American common value orientations originated in traditional cultures with characteristics of:

- Central importance of the family
- Present time orientation
- Space
- Production of goods for family use
- Limited stress on material gains
- Father as figure of authority
- Inferior status of women
- Simple patterns of work origination and group cooperation
- Accommodation of problems
- Fatalism
- Values *"of being"* rather than *"doing."*

Materials may be used by B-WEST with the express permission from Universal Business (503) 293-2244

SOLUTIONS:

- **Empower employees**

    - Let them make decisions, and participate in the decision making and problem solving process
    - Ownership, treat them like if they were the owners
    - Allow for creativity

- **Training**

    - Provide the necessary training to keep your employees skills upgraded
    - Assess their skills to alien them with the economics demands

Practice good management skills

- Create an atmosphere of trust
- Remove communication and work barriers
- Allow for diversification
- Practice effective coaching

To summarize:

The challenge of a diversified work force is real and it is here now. The workforce and organizations are different today. Through awareness, education/training and willingness to change, we can position ourselves in a competitive edge once more.

Materials may be used by B-WEST with the express permission from Universal Business (503) 293-2244

MATERIALS FROM:

A Workshop for Managing Diversity in the Workplace
A Training Guide Written By S. Kanu Kogod

Produced By:

Pfeiffer & Company
8517 Production Ave.
San Diego, CA 92121-2280
(619) 578-5900

A Primer on Diversity in the Work Force

HOW PEOPLE DEVELOP AND RESPOND TO DIFFERENT WORLD VIEWS

Culture is defined as a shared design for living. It is based on the values and practices of a *society*, a group of people who interact together over time. People absorb culture through the early process of socialization in the family, and then this process carries over to the ways in which they perceive themselves and the world. We all develop individual *world views*—simplified models of the world that help us make sense of all we see, hear, and do.

We perceive our world views as making sense if they are consistent with our society's values and our abilities to anticipate and interpret the events we experience. *Values*, which vary from culture to culture and from person to person, are the standards we use to determine whether something is "right" or "wrong."

Trouble arises when a person begins to believe that "Only my culture makes sense, espouses the right values, and represents the right and logical way to behave." This mode of thinking is called *ethnocentrism*. When two ethnocentric people from different cultures interact, there is little chance that they will achieve an understanding of each other's world views. Common ethnocentric reactions to a differing world view are anger, shock, and amusement.

If we are to manage diversity effectively, we must suspend ethnocentric judgments and begin to question why particular things are done. The opposite of ethnocentrism—and the attitude that training in managing diversity seeks to promote—is *cultural relativism*, the attempt to understand another's beliefs and behaviors in terms of that person's culture. The person who responds to interactions with cultural relativism rather than ethnocentrism is able to see alternatives and to negotiate with another person on the basis of respect for cultural differences.

THE IMPACT OF DIVERSITY IN THE WORKPLACE

In 1987 the Hudson Institute released *Workforce 2000*, the now-famous study of the work force of the future, which was commissioned by the United States Department of Labor. This study offered predictions about changes that will occur in the demographic composition of the United States population and work force by the year 2000.

Among the startling projections were the following: White males will account for only 15 percent of the 25 million people who will join the work force between the years 1985 and 2000. The remaining 85 percent will consist of white females;

immigrants: and minorities (of both genders) of black, Hispanic, and Asian origins. The Hispanic and Asian populations will each grow by 48 percent: the black population will grow by 28 percent; and the white population will grow by only 5.6 percent. In fact, it is projected that sometime in the next century non-Hispanic whites will lose their majority status in the United States.

The American work force is rapidly changing in all kinds of ways—in age mix, gender composition, racial background, cultural background, education, and physical ability. These changes are having and will continue to have a significant impact on organizational environments. In the past, when the employees of an organization represented much less diversity, there was less variety in the values that governed organizational operations and work performance. Now, however, because of increasing diversity, there are conflicting values among workers and, therefore, conflicting messages about how to do things. Changing demographics, along with economic factors and the high costs of turnover, have convinced organizations that they need to make efforts to retain employees, to develop them, and to promote from within. This trend means that it is increasingly important for employees to learn to understand one another and to work together effectively and harmoniously.

Difficulties inevitably arise when there is a great deal of diversity within an organization. Most of us have limited information about other people's world views. Frustration often occurs when two people with different world views interact; frequently, neither person feels valued or understood. Often one or the other practices ethnocentric thinking, experiencing his or her unique sense of time, use of language, and beliefs about work styles as comprising the one appropriate way to behave. When ethnocentric thinking pervades an organizational culture, the result can be exclusion of some, favoritism toward others, and intragroup conflict. The same difficulties can arise when an employee attempts to interact with a customer who is culturally different from himself or herself.

ORGANIZATIONAL APPROACHES TO MANAGING DIVERSITY

Many organizations are beginning to recognize the impact of a diverse work force and are offering their managers tips on how to manage diversity:

- Be flexible; try to adapt to the style of the person with whom you are communicating.
- Understand that cultural differences exist.
- Acknowledge your own stereotypes and assumptions.
- Develop consciousness and acceptance of your own cultural background and style.
- Learn about other cultures.
- Provide employees who are different with what they need to succeed: access to information and meaningful relationships with people in power.
- Treat people equitably but not uniformly.
- Encourage constructive communication about differences.

As these tips point out, the best way to deal with diversity in the workplace is to recognize, identify, and discuss differences. This approach represents a departure from Equal Employment Opportunity (EEO) programs, which denied differences and instead promoted the idea that acknowledging differences implied judgments of right and wrong, superiority and inferiority, normality and oddity. These programs were based on the assumption that openly identifying differences was equivalent to opening a Pandora's box of prejudice and paranoia. But, as one consultant said, echoing the new line of thought on the value of diversity, "We do nobody any favors by denying cultural differences."

These tips on managing diversity are much more easily talked about than acted on. It is this fact that has given rise to diversity training, which was developed to help managers cope with the personnel changes occurring in organizations. Diversity training must not only help people to understand differences but also must enable them to apply that understanding to new situations as they arise. The bottom line is that at the end of the training experience all participants must know how the issue of diversity relates to them individually and what they plan to do about it.

Diversity training is only the first step in the process of managing diversity in an organization. Training can have little impact unless the organizational climate honors and supports cultural differences. In this kind of climate, people come to see that any communication—whether between employees or between an employee and a customer—is a multicultural event. When communication is understood and approached in this manner, the parties involved can investigate, define, and lay out each other's cultures like maps to new territories. The organizations that promote this view will not only provide powerful guidance for their employees but will also increase customer satisfaction.

ORGANIZATIONAL BENEFITS OF MANAGING DIVERSITY

Organizations that recognize the value of diversity and manage diversity effectively have realized these benefits:

- Diversity brings a variety of ideas and viewpoints to the organization—an advantage that is especially beneficial when creative problem solving is required.
- Diversity increases productivity and makes work fun and interesting.
- Employees are willing to take risks; they play to win rather than not to lose. As a result, creativity, leadership, and innovation are enhanced.
- Employees are empowered and have a sense of their potential in and value to the company.

An Overview of the Workshop

OBJECTIVES

This book presents a workshop design for managing diversity in the workplace. The intended participants are managers and supervisors. The workshop strives to improve the participants' abilities in the following areas:

- Understanding and describing the challenges of managing diversity in the workplace;
- Recognizing the benefits of multiple perspectives in support of diversity in the workplace;
- Evaluating behavior, especially as it relates to performance evaluations;
- Understanding what it takes to retain, motivate, and promote culturally and socially diverse employees;
- Identifying and working through their own stereotypes as well as reclaiming pride in their own ethnic and cultural backgrounds;
- Responding effectively in encounters with individuals who are culturally different from themselves;
- Building a repertoire of practical methods for overcoming cultural barriers in the organizational setting;
- Intervening effectively in situations involving potential discrimination on the basis of age, sex, ethnic origin, or physical ability.
- Applying interpersonal skills to accommodate the needs of others who are culturally different from themselves; and
- Capitalizing on people's differing talents.

FEATURES

The workshop offers the following features:

- The training is experiential and concentrates on developing awareness and building skills that can be used on the job.
- The participants are engaged as experts with respect to their own cultural, age, and gender experiences. Thus, they become aware of the complexity and diversity of culture, class, physical ability, gender, and family experiences within the group and thereby learn from one another.
- The training recognizes and honors the complexity and diversity of cultural experiences within the participant group.

- The workshop addresses the specific concerns of the group, such as enhancing communication with co-workers who are culturally different from oneself.
- The participants are offered a guide for handling all types of cultural encounters (see the handout entitled Learning to Do the Right Thing at the Right Time).
- Complicated cultural interactions that occur in the workplace are clarified and simplified.

THE INTENT AND FORMAT OF THIS BOOK

The training program presented in this book highlights the dynamics of diversity—the problems, challenges, and opportunities that are involved. The book is divided into three parts. Part 1: Background and Information offers an overview of the workshop design, background material on diversity in the work force, instructions on how to prepare for the workshop, information on what to expect in terms of participant reactions, and tips for success. Part 2: Workshop Activities presents detailed instructions on how to conduct the eighteen activities that comprise the workshop.[1] Part 2 contains all of the topical content necessary to deliver lecturettes on various topics, and it also includes copies of participant handouts so that the trainer can refer to them while reviewing each activity. Part 3: Handouts presents separate copies of all handouts so that the trainer can easily extract them for reproduction.

Although the workshop is complete, the design allows for flexibility to include issues of concern to the participant group. Also, it is obvious that training alone cannot accomplish ongoing support for the valuing and managing of diversity, and certain activities explain and emphasize this point. The participants need to understand that certain key elements must exist within an organization in order for cultural sensitivity to be increased: training and orientation programs on the topic of diversity, appropriate management systems, clearly defined performance standards, and effective evaluations of on-the-job performance. This workshop promotes insights in these areas and encourages participants to carry their new knowledge and insights into the work setting; during the workshop the participants develop action plans and strategies that will help them accomplish this goal.

ACTIVITIES AND TIMING

The workshop activities presented in Part 2 are divided into three modules:

1. *Module I. Interpersonal Relationships.* This module focuses on understanding through interpersonal sharing. Initially the participants spend time discovering insights about their own values, one another's experience of diversity, the effects of prejudice, the value of multiple perspectives, and organizational obstacles to valuing diversity.

---

[1] Not all of these activities need be conducted for the training to be effective; several activities have been designated as optional. See Activities and Timing in this chapter.

2. *Module II. Relationships at Work.* In Module II the training design moves from understanding personal and interpersonal issues to workplace issues. The focus is on demonstrating the kinds of cultural collisions that often occur, why they occur, and what to do about them.

3. *Module III. Learning to Manage Diversity.* In Module III the participants practice the diversity-management skills to which they have been introduced. Using real organizational issues, they rehearse possibilities for resolving difficult situations. The concluding phase of the workshop encourages the participants to reinforce their commitments by entering into contracts with one another.

The workshop may be conducted in one day or in one and one-half days. All eighteen activities in the three modules offer eight hours and thirty-five minutes of training (excluding time for breaks, lunch, and so on), so a workshop of one and one-half days is optimal. However, if a one-day design is preferred, the trainer may reduce the training time to six hours and forty minutes by omitting the activities that are designated as optional (Activities 3, 7, 9, 12, 13, and 16). Omitting these activities does not reduce the overall effectiveness of the workshop. It is *not* recommended that the trainer reduce the time of individual activities; careful processing is essential and may not be accomplished in less time than is stipulated for each activity.

A two-day design may be created by using all eighteen activities and expanding the discussion and processing periods for individual activities. In addition, it is important to note that increased time may be necessary when participants have specific concerns about personal prejudice and organizational discrimination. If the participants know one another well and there is a sense of harmony in the group, it may be possible to spend relatively less time on developing an understanding of diversity and relatively more time on planning the implementation of a new organizational paradigm that involves honoring and managing diversity.

WORKSHOP OUTLINE

Module I. Interpersonal Relationships

- Activity 1: Up-Downs (25 minutes)
- Activity 2: Lecturette on Diversity (10 minutes)
- Activity 3: Counting Differences and Cultural Sharing (20 minutes)
- Activity 4: Introduction to Group Memberships (10 minutes)
- Activity 5: Breaking Down the Walls (30 minutes)
- Activity 6: Welcoming Ourselves (30 minutes)
- Activity 7: Small Picture, Big Picture (10 minutes)

Module II. Relationships at Work

- Activity 8: Lecturette on Cultural Collisions (10 minutes)
- Activity 9: Diversity Experiences at Work (25 minutes)
- Activity 10: Values Voting Stations (60 minutes)

Activity 11: Brainstorming Barriers (35 minutes)
Activity 12: Images and Insights (10 minutes)

Module III. Learning to Manage Diversity

Activity 13: Preconceived Notions (10 minutes)
Activity 14: Doing the Right Thing at the Right Time (15 minutes)
Activity 15: Practice and Presentations (100 minutes)
Activity 16: Diversity and Customer Service (40 minutes)
Activity 17: Action Planning and Contracting (60 minutes)
Activity 18: Reflection and Evaluation (15 minutes)

HOW TO CUSTOMIZE THE WORKSHOP

Customing the workshop greatly enhances its value to the participants. The following suggestions may be useful:

1. Before conducting the workshop, obtain information about the organization, the participants, their jobs, and the specific diversity issues that they have faced and are facing.
2. Consult friends and colleagues about the issue of diversity, collecting their perspectives and stories and thereby building a greater base of knowledge and understanding of the topic.
3. Create a "participant's manual" by binding copies of all handouts and adding materials of interest to the particular participant group involved.
4. Alter the activities, lecturettes, and discussions to reflect the needs and interests of the audience. Use examples that are especially pertinent to the audience, drawing on the participants' experiences.
5. If it seems useful to do so and time permits, allow a particularly valuable discussion to continue longer than you might have otherwise. (However, always process each activity thoroughly so that the participants can continue without feeling uneasy or perplexed about what they have done. It is critical that the participants have time to reflect on what they have experienced.)

Participant Reactions: What to Expect

This workshop has been designed to generate a great deal of communication interchange between trainer and participants and between and among participants, and the topics discussed often generate *extremely strong feelings,* resulting in a stressful experience for the participants. As mentioned previously in this book, the participants should be told *before they agree to attend* that the workshop is experiential and interactive and may generate strong feelings. Also, the trainer needs to be aware of this fact and to be prepared to handle expressions of strong feelings. Here are some typical responses:

- Some participants will be *ethnocentric* (feel that their own individual cultures represent the most logical way to think, feel, and behave) and may express the opinion that there is little need for a workshop on managing diversity in the workplace.
- Some participants may express the view that other critical priorities should take precedence over this type of training.
- Some may strongly resist a discussion of their deep-seated feelings about prejudices or personal injustices that they have experienced.
- Some may be reluctant to define ethnic differences; fear of labeling or stereotyping provides the rationale for avoiding a discussion of cultural differences.
- Some may participate fully and experience intense feelings afterward. (They may never have expressed such feelings before.)

The trainer can help the participants with their reactions in many different ways. What is essential is to demonstrate *respect* for all of the participants, regardless of their opinions, attitudes, or responses during the activities. Each person must feel accepted and welcomed. Also, it is a good idea for the trainer to describe himself or herself as a *facilitator* of activities. This relieves the trainer of the burden of resolving issues based on ethnocentric attitudes.

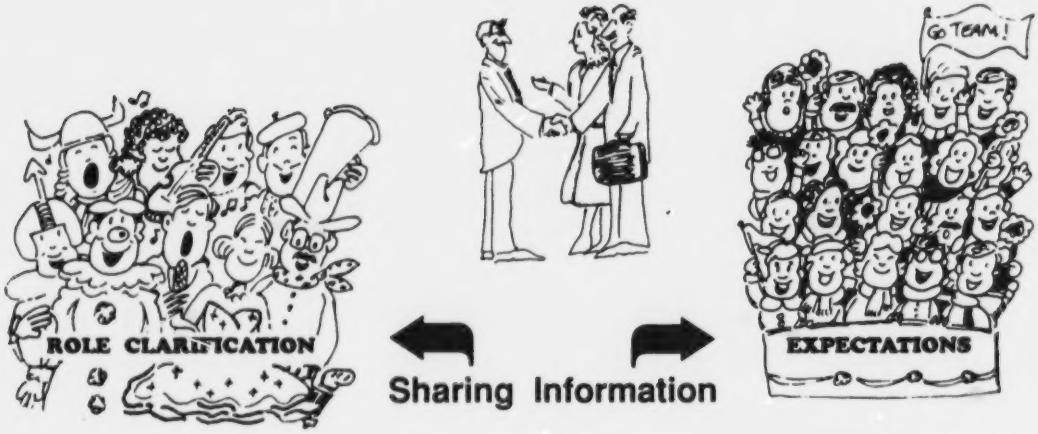
➪ *First Thoughts*

You and I—
We meet as strangers, each carrying a mystery
within us. I cannot say who you are.
I may never know you completely.
But I trust that you are a person in your own
right, possessed of a beauty and value that are
the Earth's richest treasures.
So I make this promise to you:
I will impose no identities upon you, but will
invite you to become yourself
without shame or fear.
I will hold open a space for you in the world and
allow your right to fill it with an authentic
vocation and purpose. For as long as your search
takes, you have my loyalty.

Author Unknown

➪ *Cultural Collision Outcomes*

Beginning Relationships



CULTURAL COLLISIONS

- Accommodation
- Isolation
- Lowered Expectations
- Termination

➪ *Images and Insights: Part 1*

Instructions: Think about what has happened in this workshop thus far—what you have seen, heard, said, thought, and felt—and complete the following sentences.

1. The one thing (visual image, comment, thought, feeling) that is most significant to me is:

2. What surprises me most is:

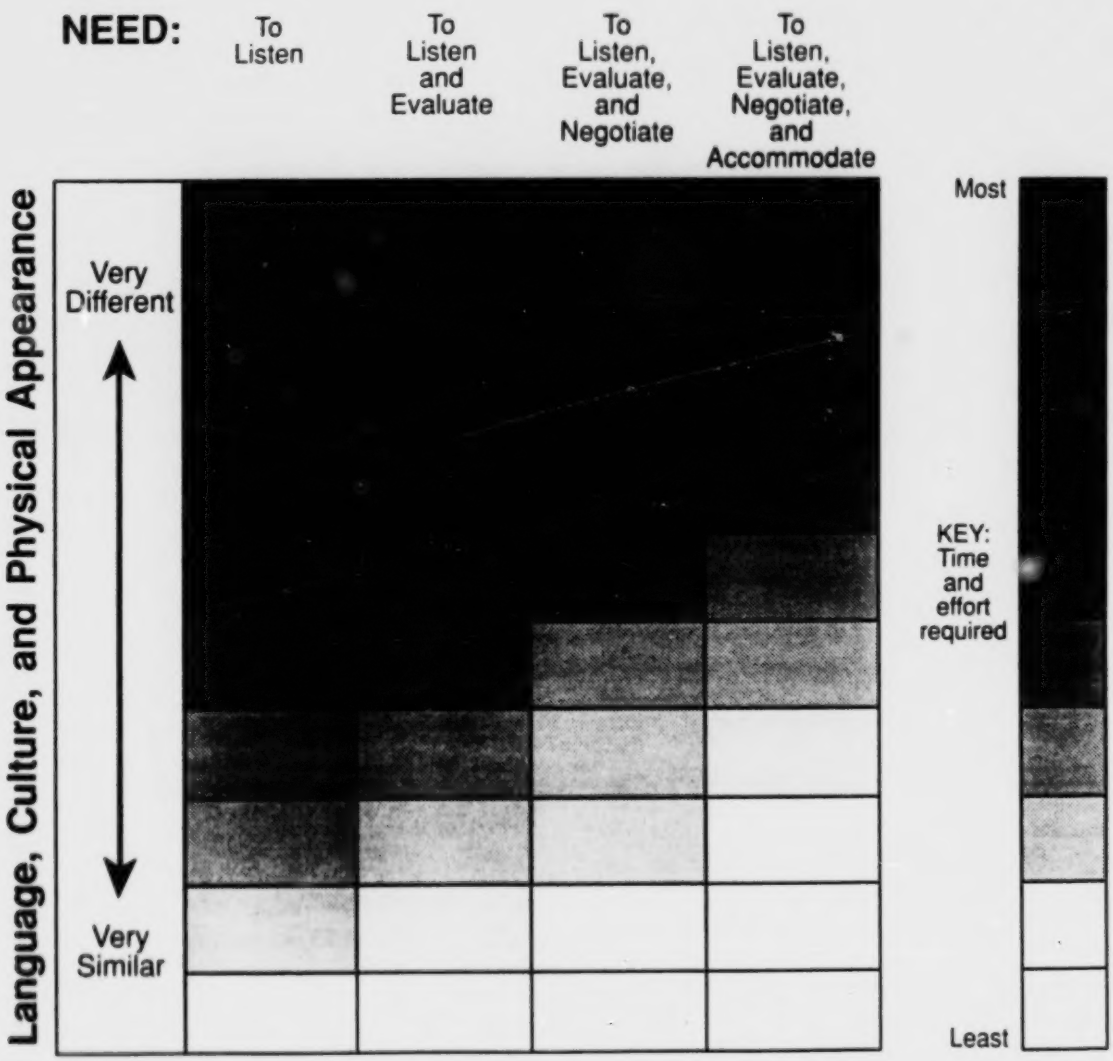
3. One topic or issue I'd like to discuss (or discuss further) is:

4. The idea or behavior that I most want to apply in my day-to-day interactions with others is:

➪ *Learning to Do the Right Thing at the Right Time*

To some degree, everyone thinks and acts:

- Like others of the same sex;
- Like others of the same occupation;
- Like others of the same age;
- Like others in the same role; and
- Like others with the same language, culture, and physical appearance.



➪ *Cultural Collision Work Sheet*

Instructions: Think of a cultural collision that you personally experienced, and answer the following questions to describe that incident.

1. Who was involved? Include a description of people's cultural and professional backgrounds.

2. What was the situation? Include descriptions of the setting (the scene and any important environmental factors), your purpose in the encounter, and your expectations.

3. What happened? Describe the collision that occurred. If appropriate, include your expectations regarding what you thought would happen versus what actually occurred, or describe confusion over roles.

4. Why did the collision occur? (What information was lacking, or what change occurred during the encounter to cause the collision?)

5. What would you like to have said or done (to vent)?

6. What are other options for negotiating a different outcome of this incident? In other words, how could this collision have been turned into only a "pinch"?

➪ *Role-Play Instructions*

1. Share stories (work-sheet contents) in your subgroup.

2. Select one story to role play.

3. Get more information about the story.

4. Assign roles.

5. Role play 1: All players vent, saying exactly what the people in the situation would like to have said. All act out their frustration and *exaggerate.*

6. Select an alternative outcome based on the model presented in Learning to Do the Right Thing at the Right Time.

7. Choose a spokesperson to moderate during role play 2.

8. Role play 2: Players act out the chosen alternative for the entire group.

➪ *The Cultural Component of Customer Service*

Customer service is never an easy job, and its difficulty can be compounded when the customer and the service provider are culturally different from each other. The following suggestions may be helpful to the service provider who must respond effectively when a culturally different customer has a problem:

1. **Listen.**
   - Actively listen to the customer.
   - Respond to *what* is being said, not *how* it is said.
   - Wait until any anger or frustration has been expressed before responding to the situation.
   - Avoid an ethnocentric reaction (anger, shock, or laughter) that might convey disapproval of the customer's expectations, phraseology, facial expression, gestures, etc.
   - Stay confident, relaxed, and open to all information.

2. **Evaluate.**
   - Hold any reactions or judgments until you determine the cause of the problem. (Was the problem caused by a violation of expectations? Was it caused by intrusion from sources outside the organizational system?)
   - Ask open-ended questions (ones that cannot be answered with a simple "yes" or "no"). Answers to these questions will give you valuable information.

3. **Negotiate.**
   - Agree with the customer's right to hold his or her opinion.
   - Explain your perspective of the problem.
   - Find out what the customer expects from your organization.
   - Acknowledge similarities and differences in what you are able to provide and what the customer expects.
   - Offer options. Tell the customer what he or she can do, given the situation.
   - Allow the customer to choose what the organization will do to correct the problem as long as the choice avoids harm (to you, the customer, or your organization). Go as far as your system will support you to accommodate the customer's needs. If necessary, change the system.
   - Commit to following through and providing a timely response.
   - Thank the customer for giving you and your organization an opportunity to improve customer service.

➪ How to Address Diversity in Your Organization

The effective management of diversity is dependent on the particular organizational culture involved and how employees perceive that culture. Employees must understand the culture and must perceive it as supporting multiple perspectives and accommodating cultural differences among employees.

An employee perceives the climate as supportive and accommodating if he or she can answer "yes" to four questions:[1]

1. Do I have the time and tools to do my job?
2. Am I paid what I think I deserve?
3. Does the organization mean what it says about the importance of diversity?
4. Am I, as an employee, being treated in the same respectful manner in which the organization wants customers to be treated?

If you are to address the issue of diversity, first you must understand the unique system of values and beliefs that exists in your own organization. These values and beliefs—which create an environment that employees perceive as either supportive or not supportive of diversity—are shaped by experience, historical tradition, competitive position, economic status, political circumstances, finances, and the work setting. If you can identify these forces and the barriers to managing diversity that characterize your organization, you can address the barriers in terms of planned organizational change.

Once you have analyzed the organizational culture and identified barriers, your next step is to create a vision for managing diversity in your organization—the way things could be in an ideal situation. Then you compare the way things *could be* with the way things *are* and assess the disparity between these two. Next, with your context in mind, you approach the issue from a problem-solving standpoint and determine what strategies you will use.

It is a good idea to develop an action plan for each strategy, determining what specific tasks need to be done, who will do them and by when, who could provide help (for example, trainers, consultants, internal experts on various subjects, or other managers), what obstacles might stand in the way of the changes you propose, and how you might remove those obstacles or diminish their impact.[2] This process yields a systematic plan to follow and increases the likelihood of success.

Remember that managers, as the people with the greatest power in any organization, are the ones who should start the process of identifying and removing barriers in the organizational climate. It is the manager's job to listen, to evaluate, to begin

[1] These questions have been adapted from a presentation given by Ron Zemke in January, 1989, at the Best of America Conference sponsored by Lakewood Publications.

[2] Note that some action plans may need the approval of higher authority before you proceed with implementation.

➪ *Action Plan*

Instructions: Think about various strategies for improving the management of diversity within your organization or your own unit. Then choose one that you believe you can implement within thirty days and complete the following action plan for implementing that strategy.

My strategy:

Specific tasks involved, who will do them, and by when:

Who might provide help (trainers, consultants, internal experts on various subjects, other managers, etc.):

Obstacles that might get in the way and how I might overcome or reduce the impact of each obstacle:

➪ *Contracting Form*

Instructions: Briefly review your basic strategy with your partner. Then complete the following items:

1. Visualize your partner's success throughout the thirty-day implementation period. Write a summary of your vision here. Then share it with your partner, and review it several times during the implementation period.

2. Make a plan to *call each other in ten days* to check on implementation progress. Plan to have your Implementation Log handy during the phone call so that you can refer to it. Jot down specifics: Who will call whom? On what date? At what time? At what phone number? Also decide how you will approach the phone call(s): Will you do more than congratulate each other? Offer suggestions? Provide moral support? Agree to support each other's efforts in other ways?

3. Make another plan to *call each other at the end of the thirty-day period.* Again jot down specifics.

Keep this form available throughout the thirty-day period. Also plan to have your Implementation Log handy so that you can refer to it during your phone calls. When you speak with your partner, remember to applaud his or her efforts.

➪ *Implementation Log*

Instructions: Use this form to record your experiences in implementing your chosen strategy. This form will be useful to you in future conversations with the partner with whom you contracted.

1. Describe your selected strategy.

2. Describe your successes in implementing your strategy: What events occurred? How did you apply your strategy? What were the significant factors that contributed to the final result?

3. Describe any problem you experienced in implementing your strategy.

4. Why did the problem occur?

5. Describe other options for successful implementation of your strategy and how the result might have differed from your actual experience.

➪ *Images and Insights: Part 2*

Instructions: Think about everything that has happened in this workshop—what you have seen, heard, said, thought, and felt—and complete the following sentences.

1. The one thing (visual image, comment, thought, feeling) that is most significant to me is:

2. What surprises me most is:

3. The idea or behavior that I most want to apply in my day-to-day interactions with others is:

4. My plan for sharing what I have learned with others at work is:

➪ *Workshop Evaluation*

1. Rate this workshop in terms of how well it met your expectations. Use a scale of 1 (low) to 10 (high) and explain your rating.

2. Describe two things about this workshop that you particularly appreciated or found helpful.

3. Describe two things that you wish you could have done or done differently during the workshop.

4. Explain what you might tell your best friend about this workshop.

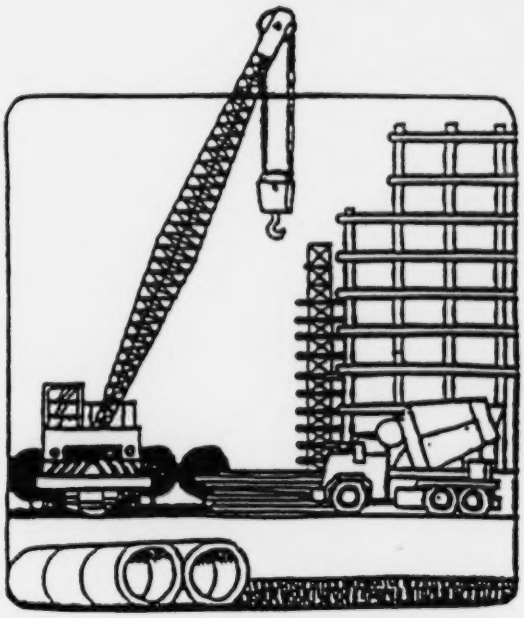
5. Make any other comments about the format and content of the workshop and/or the relevance of the concepts presented.

6. Rate the trainer on a scale of 1 (low) to 10 (high) and explain your rating.

B-WEST
(Building Workers Entering Skilled Trades)

REGIONAL TRAINING CENTER

SEXUAL HARASSMENT IN THE WORKPLACE



Portland Community College
Rock Creek Campus

An Affirmative Action Equal Opportunity Institution

MATERIALS FROM:

Addressing Sexual Harassment in the Workplace
Training Guide

Produced By:

Pfeiffer & Company
8517 Production Ave.
San Diego, CA 92121-2280
(619) 578-5900

SEXUAL HARASSMENT IN THE WORKPLACE: MANAGERIAL STRATEGIES FOR UNDERSTANDING, PREVENTING, AND LIMITING LIABILITY

Joyce Lynn Carbonell, Jeffrey Higginbotham, and John Sample

SEXUAL HARASSMENT: AN OVERVIEW

The workplace is changing. Although women no longer are confined to pink collar or female ghetto jobs, they often are stereotyped as incapable of performing the same quality or quantity of work as men. Female entry into male-dominated occupations can create situations in which the females are singled out and made to feel unwelcome solely because of gender, work performance notwithstanding. Such reactions pose a challenge to managers and executives. Because managers and executives look to human resource development (HRD) professionals for advice about such challenges, HRD practitioners need to be knowledgeable about sexual-harassment issues. It is important to note that although the majority of sexual-harassment cases involve harassment of women, men also can be harassed, and such cases may become more common.

Common sense and good management practice dictate that inaccurate stereotypes and notions of disparate treatment based on gender be eliminated. In addition, prejudicial treatment is prohibited by law (42 U.S.C. 2000e-2). Under Title VII[1] of the 1964 Civil Rights Act, commonly referred to as "Title VII," when an employer causes, condones, or fails to eliminate unfair treatment of women in the workplace, liability may ensue (42 U.S.C. 2000e-5; 42 U.S.C. 2005e-6).

This article focuses on the problem of sexual harassment in the workplace. Beginning with a definition of sexual harassment, the article describes the problem and outlines the legal conditions and liability for sexual-harassment claims. The article concludes with recommended managerial strategies for preventing and reducing the risk of a successful lawsuit alleging claims of sexual harassment.

This is a revised version of an article that appears in *The 1990 Annual: Developing Human Resources*, edited by J. William Pfeiffer, San Diego, CA: Pfeiffer & Company.

[1] For information about amendments to Title VII, see the "Summary of the Civil Rights Act of 1991" in this "Readings" section of *Addressing Sexual Harassment in the Workplace*.

Defining Sexual Harassment

Sexual harassment is more easily recognized than defined. However, the Equal Employment Opportunity Commission (EEOC) Guidelines on Discrimination Because of Sex (1987) specify the types of conduct that are considered sexual harassment. Although these guidelines do not carry the force of law, they do "constitute a defining body of experience and informed judgment to which courts and litigants may properly resort for guidance" (*General Electric Co. v. Gilbert*, 1976, at 141-142). These guidelines describe sexual harassment as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment. (p. 141)

Others define sexual harassment differently. Farley (1978, p. 33), for example, describes sexual harassment as "unsolicited, nonreciprocal male behavior that asserts a woman's sex role over her functioning as a worker." This definition avoids detailing the specific acts involved and summarizes that nature of sexual harassment as the unwillingness or failure to see women as co-workers or subordinates and the willingness to see them as sexual objects. Safran (1976, p. 149) defines sexual harassment as sexual activity that is "one sided, unwelcome, or comes with strings attached." Harassment bears no resemblance to a normal sexual relationship, which would be free of the element of threat to one's job or livelihood that is the hidden agenda of sexual harassment.

Whatever definition one chooses for sexual harassment, the basic elements remain the same. Harassment constitutes a threat in that the victim may be required to comply sexually or suffer a consequence. In other circumstances the threat may take the form of ongoing harassment that interferes with work by making the atmosphere intimidating and unpleasant. The courts have identified these two aspects respectively as *quid pro quo harassment* and *hostile environment harassment*. *Quid pro quo harassment* is the more easily recognized of the two because the threat is designed to produce a specific result. *Hostile environment harassment* is more difficult to define because it may stem from what Bem and Bem (1970) have called a "nonconscious ideology." Harassers in a group may not perceive their behavior as wrong or abnormal. Before attempting to change such behavior, managers must understand the extent and dynamics of such harassment.

The Extent of the Problem

Early studies of sexual harassment used nonrandom samples of large populations (Crull, 1982; Safran, 1976). Other researchers have randomly sampled the workplace to investigate sexual harassment more accurately (Jensen & Gutek, 1982). The

United States Merit Systems Protection Board (MSPB) study of 23,000 employees in 1981 is the most comprehensive of such studies to date, and its results support the findings of the earlier nonrandom surveys. In the MSPB sample, 42 percent of the females reported experiencing some form of sexual harassment. Although women of any age can be harassed, the majority of women who were harassed were between the ages of sixteen and nineteen. Similarly, more single and divorced women reported being victims of harassment. Tangri, Burt, and Johnson (1982) describe this as personal vulnerability and note that dependence on the job greatly increases the incidence of harassment. Most harassers of women were older, were married, and were more likely to be co-workers than supervisors. Serious forms of harassment, however, were more likely to come from a supervisor than a co-worker.

Results of the MSPB survey support earlier reports that sexual harassment has serious negative effects on the employees being harassed; these effects translated into a cost of $267 million over a two-year period (MSPB, 1988). Included in this figure were costs for training new employees, costs of treating the health problems of the harassed employees, and the costs of absenteeism and lost productivity. If the psychological, social, and physical effects on harassment victims do not create sufficient interest for intervention, the economic costs of harassment must.

Psychological and Sociological Explanations

The traditional view of sexual harassment of women involves the belief that harassing behavior is biologically based—that men cannot help themselves. Thus, sexual harassment is labeled "normal." Harassment, however, is not "normal," nor is it related to sexuality. Rather it is a question of *power* and *control.* Men and women are socialized to roles that attribute more power to men than to women. Sexual harassment on the job is an inappropriate and exaggerated extension of stereotyped social roles. Sexual harassment occurs because of socialization, stereotypes, and traditional organizational structures.

Women traditionally were socialized to be polite, passive, and submissive; men were socialized to be more aggressive. On the average, women have lower status and lower salaries than men. Expectations of appropriate behavior also differ. Konrad and Gutek (1986, p. 423) report that men may see the workplace as a "potential arena for sexual conquests." In contrast, women may perceive sexual advances at work as potential threats because they are likely to be in subordinate positions to men (Gutek & Dunwoody, 1987).

In general, the "double standard" persists at work. As Hyde (1980) and others point out, behavior is evaluated differently for males and females. Sexual behavior at work also will be viewed differently by males and females. This coincides with the finding that 67 percent of men and only 20 percent of women report that they would be flattered by harassment (Gutek, 1985).

The term "sex-role spillover" refers to the transfer of gender-role expectations to the workplace, even though those expectations are irrelevant or inappropriate to the job (Gutek & Morash, 1982). For example, sex-role spillover involves behaviors such as expecting women to make and serve coffee, to run errands, or to act "motherly" or "wifely." Once such a role is established, it extends to other expectations,

such as dressing in a sexually attractive way. This type of spillover is most likely to occur in situations in which women work in low-status jobs.

In high-status or male-dominated jobs, spillover is less likely; women tend to do the same tasks as men. Instead there is more likely to be an attempt to put women in their place by restoring traditional roles. Sexual harassment is both a way of reasserting traditional status relationships and a way to establish control through the threat of harassment.

The organizational model of sexual harassment posits that institutions may provide a structure that makes harassment possible (Tangri, Burt, & Johnson, 1982). Organizations that are highly structured and stratified are more conducive to sexual harassment because they allow negative consequences for failure to acquiesce to sexual demands. This organizational structure can be used to control women's behavior in the workplace. Those more vulnerable in the organization, such as trainees or those who "need" their jobs, are more likely to be harassed. This fact, combined with other sociocultural factors, makes women the more likely victims.

Thus, harassment occurs when employers and co-workers confuse employment expectations with sex-role expectations and when males are threatened because females have invaded what they believe is their territory—the traditionally all-male jobs. Unfortunately sexual harassment is pervasive and affects both morale and productivity.

PROBLEMS IN REPORTING

As is noted earlier, surveys consistently reveal high rates of sexual harassment across a variety of occupations, yet actual rates of reporting are low. It is possible that victims of harassment fear reporting because of the media attention showered on well-known sexual-harassment cases. It has been suggested that there is a "silent reaction to sexual harassment" (Brooks & Perot, 1991) similar to the reaction that Burgess and Holstrom (1974) noted in rape victims. This silence may be part of what allows sexual harassment to continue and may also be related to a lack of information about sexual harassment or about procedures for reporting. It also has been suggested that the power difference between the victim and the accused may make the victim feel particularly vulnerable and, thus, less likely to report (Riger, 1991). In addition, reporting sexual harassment may have negative consequences for the victim, who may be subject to additional harassment, ostracized by co-workers, transferred, or involved in a long and arduous process with little in the way of results. The emotional as well as the financial costs may act as a deterrent to the filing of sexual-harassment claims.

LEGAL CONDITIONS FOR SEXUAL-HARASSMENT CLAIMS

Courts have imposed liability on employers and co-workers for participating in, condoning, or permitting sexual harassment at work under two theories that parallel the EEOC guidelines. These two theories on which liability may be found have been

referred to as *quid pro quo liability* and *hostile environment liability* (*Katz v. Dole*, 1983).

Quid pro quo liability is established when a sexual act is the prerequisite condition to employment, promotion, or any other job benefit. The converse also is true; quid pro quo liability can be found when the refusal to engage in a sexual act results in being fired, denied promotion, or having a job or benefit withheld. Unlike the hostile working environment situation, the plaintiff in a quid pro quo case must prove that the sexual demand was linked to a tangible, economic aspect of the harassed employee's compensation, term, condition, or privilege of employment (*Henson v. City of Dundee*, 1982; *Vermett v. Hough*, 1986).

Hostile environment liability is the second legal theory on which sexual harassment can be predicated. Individuals who must work in an atmosphere made hostile or abusive by the unequal treatment of the sexes are denied the equal employment opportunities guaranteed by law and the Constitution (*Henson v. City of Dundee*, 1982; U.S. Constitution, Amendment 14). As the Court of Appeals for the Eleventh Circuit said:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets (*Henson v. City of Dundee*, 1982, note 7, at 902).

The elements of a hostile environment case were most clearly spelled out in *Henson v. City of Dundee* (1982). To prevail in such a suit, the court noted that the plaintiff must establish the existence of four elements. First, as in all Title VII cases, the employee must belong to a protected group. This requires only "a simple stipulation that the employee is a man or a woman" (*Henson v. City of Dundee*, 1982, at 903). Second, the employee must show that he or she was subject to unwelcome sexual harassment. Third, the harassment must have been based on sex and if it were not for the employee's sex, the employee would not have been subjected to the hostile or offensive environment. Fourth, the sexual harassment must have affected a term, condition, or privilege of employment. Details of the second, third, and fourth elements of a hostile environment case will be explored further in the sections that follow.

Unwelcome Sexual Harassment

The Supreme Court has addressed the issue of what constitutes unwelcome sexual harassment. In *Meritor Savings Bank v. Vinson* (1986), a bank employee alleged that following completion of her probationary period as a teller trainee, her supervisor invited her to dinner; during the course of the meal, the supervisor suggested that they go to a motel to have sexual relations. The employee at first declined, but eventually agreed because she feared she might lose her job by refusing. Thereafter,

over the course of the next several years, the employee alleged that the supervisor made repeated demands for sexual favors. She alleged that she had sexual intercourse forty or fifty times with her supervisor, was fondled repeatedly by him, was followed into the women's restroom by him, and was raped forcibly on several occasions. In defending the suit, the defendant bank averred that because the employee had voluntarily consented to sexual relations with her supervisor, the alleged harassment was not unwelcome and was not actionable.

The Supreme Court disagreed. The Court stated that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual-harassment suit brought under Title VII" (*Meritor Savings Bank v. Vinson,* 1986, at 2406). The focus of a sexual-harassment claim "is whether [the employee] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary" (*Meritor Savings Bank v. Vinson,* 1986, at 2406). Sexually harassing conduct is unwelcome if the "employee did not solicit it or invite it, and the employee regarded the conduct as undesirable or offensive" (*Moylan v. Maries County,* 1986).

Conduct is deemed unwelcome based on a "totality of circumstances" analysis. Conduct alleged to be sexual harassment must be judged by a variety of factors, including the nature of the conduct; the background, experience, and actions of the employee; the background, experience, and actions of co-workers and supervisors; the physical environment of the workplace; the lexicon of obscenity used; and an objective analysis of how a reasonable person would react and respond in a similar work environment (*Rabidue v. Osceola Refining Co.,* 1986). Rather than risk making an incorrect, ad hoc determination of whether conduct is or is not unwelcome in each instance of alleged sexual harassment, managers should be prepared to take appropriate action when such conduct first appears to be offensive and unwelcome.

Harassment Based on Sex

Another element of a Title VII claim of sexual harassment requires that the harassment be directed against an employee based on the employee's sex. Conduct that is offensive to both sexes is not sexual harassment because it does not discriminate against any protected group (*Bohen v. City of East Chicago, Ind.,* 1986; *Henson v. City of Dundee,* 1982). "The essence of a disparate treatment claim under Title VII is that an employee. . .is intentionally singled out for adverse treatment on the basis of a prohibited criterion" (*Henson v. City of Dundee,* 1982, at 903).

The prohibited criterion here is the employee's sex. In quid pro quo cases, meeting this requirement is self-evident. The request or demand for sexual favors is made because of the employee's sex and would not otherwise have been made. However, it is not always as clear in a hostile environment based on sexual harassment in which ". . .the plaintiff must show that but for the fact of her [or his] sex, [the employee] would not have been the object of harassment" (*Henson v. City of Dundee,* 1982, at 904).

An example of unwelcome conduct directed at an employee that would not have occurred but for that employee's sex is found in *Hall v. Gus Construction Co.* (1988). Three female employees of a road-construction firm filed suit alleging sexual harassment by fellow male employees. The offending and unwelcome conduct included instances of men's using sexual epithets and nicknames; repeated requests to engage in sexual activities; physical touching and fondling of the women; exposure of the men's genitals or buttocks; display of obscene pictures to the women; urinating in the women's water bottles and in the gas tank of their work truck; refusing to perform necessary repairs on their work truck until a male user complained; and refusing to allow the women restroom breaks in a town near the construction site.

In finding the firm guilty of sexual harassment, the court concluded that the "incidents of harassment and unequal treatment. . .would not have occurred but for the fact that [the employees] were women. Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances" (*Hall v. Gus Construction Co.*, 1988, at 1014).

Business managers and executives should be aware that any type of unwelcome conduct that is directed at an employee because of the person's sex may constitute sexual harassment. The lesson is to be alert and to stifle any conduct that threatens disparate treatment because of the employee's sex.

Harassment Affecting a Condition of Employment

Title VII prohibits discrimination based on sex with respect to "compensation, terms, conditions, or privileges of employment" (42 U.S.C. 2000e-2). It readily can be seen how quid pro quo sexual harassment constitutes sexual discrimination with regard to compensation, terms, conditions, or privileges of employment; but a sexually hostile environment also can affect a condition of employment, without any economic or tangible job detriment suffered.

This is the case because one of the conditions of any employment is the psychological well-being of the employees (*Meritor Savings Bank v. Vinson*, 1986; *Rogers v. EEOC*, 1981). When the psychological well-being of employees is adversely affected by an environment polluted with abusive and offensive harassment based solely on sex, Title VII provides a remedy. "[T]he language of Title VII is not limited to 'economic' or tangible discrimination. The phrase 'terms, conditions or privileges of employment' evinces a Congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment" (*Meritor Savings Bank v. Vinson*, 1986, at 2404).

However, the sexual harassment "must be sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment'" (*Meritor Savings Bank v. Vinson*, 1986, at 2406). Isolated incidents (*Fontanez v. Aponte*, 1987; *Petrosky v. Washington-Greene County Branch*, 1987; *Sapp v. City of Warner Robins*, 1987; *Strickland v. Sears, Roebuck & Co.*, 1987) or genuinely trivial ones (*Katz v. Dole*, 1983; *Moylan v. Maries County*, 1986) will not give rise to sexual-harassment liability.

LIABILITY FOR SEXUAL-HARASSMENT CLAIMS

Theories of Liability

At least three broad categories of conduct can be identified that generally lead to a legal finding of sexual harassment. First, liability invariably follows when allegations of quid pro quo sexual harassment are proven (*Arnold v. City of Seminole*, 1985). Demands for sex acts in exchange for job benefits are the most blatant of all forms of sexual harassment. In addition, when a job benefit is denied because of an employee's refusal to submit to the sexual demand, a tangible or economic loss is readily established.

Second, courts frequently conclude that sexual harassment exists when the offending conduct was intentionally directed at an employee because of the employee's sex, was excessively beyond the bounds of job requirements, and detracted from the actual accomplishment of the job. When such conduct becomes so pervasive that the offending employee's attention is no longer focused on job responsibilities and when significant time and effort are diverted from work assignments to engage in the harassing conduct, courts have concluded that sexual harassment exists.

This principle can be illustrated by examining a law enforcement case. In *Arnold v. City of Seminole* (1985), a female police officer chronicled a series of events and conduct to which she was subjected because she was female. The offensive conduct that created a hostile working environment included the following:

1. A lieutenant told her he did not believe in female police officers;
2. Superior officers occasionally refused to acknowledge or speak to her;
3. Obscene pictures were posted in public places within the police station with the female officer's name written on them;
4. Epithets and derogatory comments were written next to the officer's name on posted work and leave schedules;
5. False misconduct claims were lodged against her;
6. Work schedules were manipulated to prevent the female officer from being senior officer on duty, thus denying her command status;
7. She was singled out for public reprimands and not provided the required notice;
8. Members of the female officer's family were arrested, threatened, and harassed;
9. Other officers interfered with her office mail and squad car;
10. Attempts to set up the female officer in an illegal drug transaction were contemplated; and
11. The female officer was not provided equal access to station-house locker facilities.

Based on this amalgam of proof, which far exceeded any claim of office camaraderie, the court ruled that the female officer had indeed been subjected to an openly hostile environment based solely on her sex.

The third category of finding sexual harassment generally results from conduct or statements that reflect the belief that women employees are inferior by reason of their sex or that women have no rightful place in the work force. For example, sexual harassment was found when a supervisory employee stated that he had no respect for the opinions of another employee because she was a woman (*Porta v. Rollins Environmental Services*, 1987). Similarly, the court found sexual harassment in the case of a supervisor who treated his male employees with respect but treated his female employees with obvious disdain. The supervisor called women employees "Babe" and "Woman" in derogatory fashion and indicated his belief that women should not be working at all (*DelGado v. Lehman*, 1987).

Employer Liability for Sexual Harassment

One of the primary goals of Title VII is to eliminate sexual harassment from the workplace (*Arnold v. City of Seminole*, 1985; Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 1987). However, to the extent to which it does not do so, civil liability remedies are available against both the employer and the offending co-workers and/or their supervisors. Both are obvious matters of concern for business managers.

In *Meritor Savings Bank v. Vinson* (1986, at 2408), the Supreme Court ruled that employer liability would be guided by agency principles, although it declined "to issue a definitive rule on employer liability." Three such agency principles can be identified as follows:

1. When a supervisory employee engages in quid pro quo sexual harassment, that is, the demand for sex in exchange for a job benefit, the employer is liable. As one court explained:

> In such a case, the supervisor relies upon his apparent or actual authority to extort sexual consideration from an employee. . . .In that case the supervisor uses the means furnished to him to accomplish the prohibited purpose. . . .Because the supervisor is acting within at least the apparent scope to the authority entrusted to him by the employer when he makes employment decisions, his conduct can fairly be imputed to the source of his authority (*Henson v. City of Dundee*, 1982, at 910).

2. In cases of sexual harassment by supervisory employees that creates a hostile working environment, courts have held the employer liable (*Katz v. Dole*, 1983).
3. If the sexually hostile working environment is created at the hands of co-workers, the employer will be liable if it knew or reasonably should have known of the harassment and if it took no remedial action.

These three principles suggest ways to prevent liability for sexual harassment. Managers and executives must not engage or participate in any conduct that encour-

ages, suggests, or constitutes sexual harassment. When such conduct comes to the attention of any manager, *he or she must take immediate corrective action.* Further, all managers have an *affirmative obligation* to monitor the workplace to ensure that sexual harassment does not become a widespread practice.

RECENT LEGAL DEVELOPMENTS IN SEXUAL-HARASSMENT CASES

Earlier sexual-harassment cases alleging hostile environment were governed by rigid standards regarding what constituted a "hostile environment." For example, the *Arnold v. City of Seminole* (1985) case resulted in eleven separate findings of hostile environment by the Federal District Court.

Two recent cases exemplify the Federal District Court's responsiveness to the losses that women encounter as a result of hostile environments.

In the first case, a woman contended that her work environment was hostile because of the unwanted attention and frequent "love letters" from a male co-worker. The court adopted a "reasonable woman standard" in the belief that the more traditionally accepted "reasonable person" standard perpetuates and reinforces discrimination based on sex. According to the court, men "may view sexual conduct in a vacuum, without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive" (*Ellison v. Brady,* 1991).

Closely behind *Ellison* was *Robinson v. Jacksonville Shipyards* (1991), which is a basis for determining what constitutes the standard of a "reasonable woman." The Federal courts will look at the total work environment in order to make a determination of hostile environment. This posture is necessary because in many work contexts (such as shipyards, police and fire departments, medicine, and management), the environment has been traditionally male-dominated.

In the Robinson case, the court heard the complaint from a female shipyard welder who claimed that (1) calendar pictures of women in various stage of undress and sexually provocative poses, in concert with (2) sexually explicit and demeaning language constituted a hostile work environment. The court concurred and determined that a hostile environment existed in the shipyard.

Furthermore, an expert witness who testified in the Robinson case explained that a hostile environment encouraged sexual stereotyping and that performance appraisals were biased against women who complained about such an environment.

MANAGERIAL STRATEGIES TO PREVENT AND REDUCE LIABILITY

The potential for sexual harassment allegations and lawsuits exists in any workplace. The best strategies to prevent and to reduce liability may be to establish policies and procedures that require the reporting of sexual harassment and to train supervisors and employees to recognize and resolve such problems within the organization. Fol-

lowing is a list of suggested strategies for preventing sexual harassment and limiting liability:

1. Determine the extent and nature of harassment.
   - Apply survey research methods, including confidential interviews with a random sample of employees.
   - Employ an internal personnel specialist or external consultant knowledgeable in EEOC matters.
   - Review personnel records, especially exit interviews, for excessive turnover rates for women.
   - Analyze promotion, selection, transfer, and dismissal records for patterns of harassment.
   - Ensure anonymity and confidentiality for those interviewed.
   - Be prepared to take appropriate action if incidents of sexual harassment are reported.
2. Develop a written policy that includes the following components:
   - The legal basis in Title VII prohibiting discrimination in employment;
   - Any applicable state statutes that complement Federal laws and procedures;
   - A statement that harassment on the basis of sex is prohibited by law and is contrary to organizational policy;
   - Identification of specific behaviors that constitute sexual harassment; and
   - An outline of consequences, including progressive discipline and possible discharge.
3. Charge employees with the responsibility to report harassment or discriminatory practices using the following steps:
   - Warn the offending party that such behaviors are unwelcome and that they must stop.
   - Report the offensive behavior to a supervisor, manager, or designated individual, first verbally and then, if the offensive action continues, in writing.
4. Communicate the policy by posting it in the workplace and by making the policy a part of the orientation of new employees, especially supervisors.
5. Require corporate attorneys to become knowledgeable in EEOC matters, especially sexual harassment. Secure competent labor relations attorneys and/or external consultants who can advise corporate staff on preventive and rehabilitative strategies.
6. Make supervisors responsible for keeping the workplace free of harassing, abusive, disorderly, or disruptive conduct and for initiating necessary disciplinary action as follows:
   - Warn offenders that they must cease such behaviors or face disciplinary action.

- Develop a written record of testimony from the complainant, the offender, witnesses, and any other knowledgeable parties when a warning does not resolve the matter.
- Remove the victim from the work environment, with his or her consent, until the matter is resolved.
- Counsel the supervisor, complainant, and offender as appropriate and necessary.
- Refer the complainant and the file to the designated staff office responsible for employment relations/EEOC.
- Initiate appropriate disciplinary action, including corrective action by higher-level management, in cases in which the supervisor has not taken appropriate action.

7. Provide an impartial appeal or complaint procedure to supplement supervisory channels; such a procedure should provide for the following:
   - Timely notice to all parties involved (complainant, alleged offender, supervisors, and witnesses);
   - Opportunity for a fair and impartial review by objective and responsible members of the organization;
   - Corrective action steps to make the complainant/victim "whole" again as quickly as possible, including back pay, promotion, or other opportunities lost because of the harassment;
   - Identification of other employees in situations similar to that of the victim and action steps to make them "whole," including back pay, promotions, or other opportunities lost because of harassment; and
   - Assistance for complainants who choose to pursue action independently by filing directly with EEOC or equivalent human relations commissions at the state level or directly in court.
8. Provide training for managers, supervisors, and employees that clearly communicates information relevant to harassment. Components for accomplishing this objective include the following:
   - Training for supervisors about how to identify harassment, the contents and procedures of organizational policy, counseling and disciplinary skills related to resolving minor infractions, and clarification of the scope of responsibility of supervisors; and
   - Training for employees about understanding the organization's policy against harassment; the victim's responsibility to communicate the "unwelcomeness" of harassing behavior to the offender and to others as prescribed in the policy; and employee rights and remedies, including options to file directly with EEOC or state commissions on human relations.

Checklist for Assessing Complaints

The following checklist may be of assistance in determining the extent to which sexual harassment has occurred:

1. **Severity of the conduct.** Behaviors generally can be placed along a continuum ranging from mild to severe. Although no hard lines can be drawn, conduct will tend toward one end of the continuum or the other.

2. **Number and frequency of encounters.** The number of incidents and the time span between them is important. A single incident may not seem severe but may become more serious if repeated often and with persistence.

3. **Apparent intent of the harasser.** Actual intent is irrelevant; the effect of the act is what is important. The question to be asked is what reasonable people would have meant had they acted in a similar manner. Also important is whether the behavior was directed at the victim or simply overheard or seen.

4. **Relationship of the two employees.** Employees expect higher standards of conduct from supervisors. What may be permissible from a co-worker is inappropriate from supervisory personnel and may be more serious and more threatening because of the power relationship. Also to be considered is the nature of the interpersonal relationship; for example, it is important to assess whether or not these people generally have gotten along well, have had an ongoing feud, or have been involved romantically.

5. **Victim's provocation.** The behavior of the victim should be considered but not overweighed. Blaming the victim for causing the harassment is a common pattern that should not be allowed; however, if the complaining employee "provokes" such behavior, it loses its "unwelcome" connotation.

6. **Response of the victim.** It is generally assumed that the victim has some responsibility for communicating that harassing behavior is unwelcome. This responsibility varies with the severity of the conduct; for example, in the case of forced fondling or attempted rape, the victim has less responsibility to express objection.

7. **Effects on the victim.** An evaluation should be made of the effects of the offensive behavior on the employee. For instance, it is important to assess whether or not the employee was embarrassed, humiliated, physically injured, demoted, denied a promotion, or harmed in other ways.

8. **Working environment.** Reasonable people usually expect different behaviors depending on the nature of the working environment. Conduct appropriate in a factory may not be appropriate in an office.

9. **Public or private situations.** Different types of harassing behaviors could be more or less serious depending on whether they happened publicly or privately.

10. **Men-women ratio.** The higher the ratio of men to women in the work environment, the more likely harassment is to occur.

CONCLUSION

Managers must effectively resolve each instance of sexual harassment. The importance of this requirement cannot be overstated. Not only is there a self-evident need to do so for conformance to sound management principles; the Supreme Court has noted that "the mere existence of a grievance procedure and a policy against discrimination" (*Katz v. Dole,* 1983; *Meritor Savings Bank v. Vinson,* 1986; *Vermett v. Hough,* 1986) will not by itself insulate an employer from liability. The grievance procedure must effectively resolve problems.

Although the law alone cannot realistically dispossess people of their personal prejudices, it can require that they not exhibit them in the workplace. It is the responsibility of all business managers and executives to see that they do not. It is also the responsibility of managers and executives to display the behavior that they wish to see in their employees. It must be demonstrated, not only by policy but also by example, that sexual harassment is neither appropriate nor tolerated. The HRD practitioner shares this responsibility by providing information, policy recommendations, and training to ensure that affirmative action is taken against sexual harassment.

REFERENCES

42 U.S.C. 2000e-2.

42 U.S.C. 2000e-5.

42 U.S.C. 2005e-6.

Arnold v. City of Seminole, 614 F. Supp. 853 (E.D. Oklahoma 1985).

Bem, S.L., & Bem, D.J. (1970). Case study of a nonconscious ideology: Training the woman to know her place. In D.J. Bem (Ed.), *Beliefs, attitudes, and human affairs* (pp. 89-99). Belmont, CA: Brooks/Cole.

Bohen v. City of Chicago, Ind., 799 F.2nd 1180 (7th Cir. 1986).

Brooks, L., & Perot, A. (1991). Reporting sexual harassment: Exploring a predictive model. *Psychology of Women Quarterly, 15,* 31-47.

Burgess, A.W., & Holmstrom, L. (1974). Rape trauma syndrome. *American Journal of Psychiatry, 131,* 981-986.

Crull, P. (1982). *Sexual harassment and male control of women's work* (Research Series Report No. 5). New York: Working Women's Institute.

DelGado v. Lehman, 665 F. Supp. 460 (E.D. Va. 1987).

Ellison v. Brady, 924 F.2d 871 (9th Cir. 1991).

Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex. 29 C.F.R. 1604.11 (1987).

Farley, L. (1978). *Sexual shakedown: The sexual harassment of women on the job.* New York: McGraw-Hill.

Fontanez v. Aponte, 660 F. Supp. 145 (D. Puerto Rico 1987).

General Electric Co. v. Gilbert, 429 U.S. 125 (1976).

Gutek, B. (1985). *Sex and the workplace: Impact of sexual behavior and harassment on women, men and organizations.* San Francisco: Jossey-Bass.

Gutek, B., & Dunwoody, V. (1987). Understanding sex in the workplace and its effects on men, women and organizations. In A. Stromberg, L. Larwood, & B. Gutek (Eds.), *Women and work: An annual review* (Vol. 2, pp. 249-269). Beverly Hills, CA: Sage.

Gutek, B., & Morash, B. (1982). Sex ratios, sex role spillover, and sexual harassment of women at work. *Journal of Social Issues, 38,* 55-74.

Hall v. Gus Construction Co., 842 F.2d 1010, 1016 (8th Cir. 1988).

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

Hyde, J. (1980). *Half the human experience: The psychology of women* (3rd ed.). Lexington, MA: D.C. Heath.

Jensen, I., & Gutek, B. (1982). Attributions and assignments of responsibility in sexual harassment. *Journal of Social Issues, 38,* 121-136.

Katz v. Dole, 709 F.2d 251 (4th Cir. 1983).

Konrad, A., & Gutek, B. (1988). Impact of work experiences on attitudes toward sexual harassment. *Administrative Science Quarterly, 31,* 422-438.

Meritor Savings Bank v. Vinson, 106 S.Ct. 2399 (1986).

Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986).

Petrosky v. Washington-Greene County Branch, 45 F.E.P. Cas. 673 (W.D. Pa. 1987).

Porta v. Rollins Environmental Services, 654 F. Supp. 1275 (D.N.J. 1987).

Rabidue v. Osceola Refining Co., 805 F.2d. 611 (6th Cr. 1986).

Riger, S. (1991). Gender dilemmas in sexual harassment policies and procedures. *American Psychologist, 46,* 497-505.

Robinson v. Jacksonville Shipyards, 59 LW 2470 (1991).

Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).

Safran, C. (1976, November). What men do to women on the job: A shocking look at sexual harassment. *Redbook,* pp. 149, 217-223.

Sapp v. City of Warner Robins, 655 F. Supp. 1043 (M.D. Georgia 1987).

Strickland v. Sears, Roebuck & Co., 46 F.E.P. Cas. 1024 (E.D. Va. 1987).

Tangri, S., Burt, M., & Johnson, L.D. (1982). Sexual harassment at work: Three explanatory models. *Journal of Social Issues, 38,* 33-54.

U.S. *Constitution,* Amendment 14.

U.S. Merit Systems Protection Board. (1981). *Sexual harassment in the Federal workplace: Is it a problem?* Washington, DC: U.S. Government Printing Office.

U.S. Merit Systems Protection Board. (1988). *Sexual harassment in the Federal Government: An update.* Washington, DC: U.S. Government Printing Office.

Vermett v. Hough, 627 F. Supp. 587 (W.D. Mich. 1986).

SUMMARY OF THE CIVIL RIGHTS ACT OF 1991

PURPOSE OF THE CIVIL RIGHTS ACT OF 1991

The stated purpose of the Civil Rights Act of 1991 (CRA of 1991), which was passed by Congress on November 7, 1991, and signed into law by President Bush on November 21, 1991, is to provide appropriate remedies to protect against and to deter unlawful discrimination and harassment in the workplace and to restore the strength of Federal antidiscrimination laws that have been weakened by several recent Supreme Court decisions. In general, the new law amends the Civil Rights Act of 1964 (Title VII) and Revised Statutes (42 U.S.C.).

HIGHLIGHTS OF THE ACT

The following are the most significant aspects of the new law.

Topic	What the Law Does
Title VII coverage	Specifies that Title VII covers extraterritorial employment
Employment testing	Bars discriminatory use of test scores to favor any protected group over any other group (e.g., "race norming")
Seniority systems	Broadens potential time frame for challenging discriminatory seniority systems
Race discrimination	Ensures that § 1981 applies to race discrimination in all aspects of employment

---

Adapted from *Analysis of the Americans with Disabilities Act and the EEOC Regulations*, Copyright © 1991, The Research Institute of America, Inc. Used with permission.

Legislative materials cited in the summary include: Senate Labor and Human Resources Committee Report (Senate Report 101-315); House Education and Labor Committee Report (House Report 102-40, Part 1); House Judiciary Committee Report (House Report 102-40, Part 2). This commentary does not purport to represent adequate legal counsel.

Topic	What the Law Does
Burdens of proof	Mandates that employer defending a Title VII disparate impact challenge to an employment practice show that practice is "job-related" for the particular position and consistent with "business necessity"; also creates new burden of proof for "mixed motive" disparate treatment cases
Damages	Permits specified amounts of compensatory and punitive damages to be awarded to victims of intentional job bias
Government employees	Extends Title VII antibias principles to Congress
Consent decrees	Limits the circumstances under which consent decrees may be challenged
Fees and costs	Removes limit on fees recoverable for use of experts in job bias cases
Prejudgment interest	Makes prejudgment interest available in suits against Federal government

FOUR PERTINENT NEW TITLES

The CRA of 1991 contains five separate titles. However, only four are pertinent, as Title V: Civil War Sites Advisory Commission (Act § 501) makes only minor amendments, unrelated to employment discrimination, in the Civil War Sites Study Act of 1990. The four titles are listed below; summaries of the significant sections follow.

- Title I: Federal Civil Rights Remedies
- Title II: Glass Ceiling
- Title III: Government Employee Rights
- Title IV: General Provisions

TITLE I

101. Prohibition against all racial discrimination in the making and enforcement of contracts

This section clarifies that Title VII, Section 1977 of the Revised Statutes (42 U.S.C. 1981) applies to race discrimination in the performance and termination of employment contracts (post-hiring and discharge) *in addition* to the formation of such contracts.

Before *Patterson,* Federal courts routinely held that § 1981 prohibited racial discrimination in connection with the performance of employment contracts, including discriminatory wages, denial of promotion, denial of training, downgrading, harassment, discharge, and other working conditions.

The Supreme Court held in 1989 *(Patterson v McLean Credit Union)* that the right guaranteed under 42 U.S.C. 1981 was limited in the employment context to hiring and promotion decisions that involved the formation of new contracts and did not apply to breaches of contracts or to such post-formation conduct as racial harassment on the job.

The CRA of 1991 reverses *Patterson v McLean Credit Union* by amending § 1981 to cover the making, performance, modification, and termination of employment contracts, as well as the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship. This list is intended to be illustrative rather than exhaustive and is intended to cover promotion, transfer, demotion, harassment, and discharge.

102. Damages in cases of intentional discrimination in employment

Amends section 1977 (42 U.S.C. 1981) by inserting new section 1977A. Expands the types of compensatory and punitive damages recoverable for violations of Title VII, the Americans with Disabilities Act of 1990 (ADA), and the Rehabilitation Act of 1973.

Provides limitations to the amount of compensatory damages that may now be awarded for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of awardable punitive damages for each complaining party, based on number of employees of the respondent, as follows:

- $50,000 for covered employers with more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year;
- $100,000 for covered employers having more than 100 and fewer than 201 employees during the periods specified;
- $200,000 for covered employers having more than 200 and fewer than 501 employees during the periods specified; and

- $300,000 for covered employers having more than 500 employees during the periods specified.

Employers with fewer than 15 employees are not covered by Title VII or the ADA.

A House Committee Report, Part 1, p. 73 states that "It is appropriate to take an employer's size and financial standing into account in awarding punitive damages, since the amount must be sufficient to deter the employer from repeating the unlawful conduct."

Either party may demand a *trial by jury,* and the court shall not inform the jury of the limitations described above.

The Supreme Court held in 1974 that there was no right to trial by jury under Title VII, since the statute's express authorization of remedial orders only refers to equitable measures *(Curtis v Loether).* The allowance of damage awards for Title VII proceedings under CRA 1991 changes this.

Previously, the punitive damages available to victims of race discrimination under § 1981 could not be recovered under Title VII by victims of discrimination based on sex, religion, or other prohibited forms of intentional discrimination on the job. Thus, there was no meaningful deterrent for these forms of intentional job discrimination.

The CRA of 1991 says that compensatory and punitive damages now may be awarded under Title VII, the Americans with Disabilities Act, and those provisions of the Rehabilitation Act of 1973 that cover employment by the Federal government. These remedies are *legal,* as opposed to equitable, in nature.

As amended by the CRA of 1991, punitive damages not otherwise available under § 1981 may be recovered in a Title VII action against an employer that has engaged in intentional discrimination that is unlawful for reasons other than disparate impact, subject to the limitations described previously. Punitive damages may be awarded when the complaining party has demonstrated that an employer has engaged in a discriminatory practice with malice or with reckless indifference to the individual's Federally protected rights. However, punitive damages may not be recovered from a government, government agency, or subdivision. The CRA of 1991 specifically provides that compensatory damages—not including back pay, interest on back pay, or any other equitable relief authorized under section 706(g) of the CRA of 1964—may be recovered in a Title VII action against a business that has engaged in intentional discrimination that is unlawful for reasons other than disparate impact. These damages are subject to limitations and may not be recovered under Title VII if relief also is available to the complaining party under § 1981.

However, the CRA's provisions authorizing and limiting awards of compensatory and punitive damages may not limit the scope of § 1981 or the relief available under that law. The CRA of 1991 apparently imposes no limit on compensatory damages for past pecuniary losses. Damages available under § 1981 for race and national origin discrimination remain unlimited.

Compensatory and punitive damages also are now available in nondisparate impact actions brought under the ADA or under those provisions of the Rehabilitation Act of 1973 that cover employment by the Federal government, subject to certain limitations, unless the covered business has demonstrated good faith efforts to make a reasonable accommodation that would provide an equally effective em-

ployment opportunity without causing an undue hardship on the operation of the business. Employers who make such a showing are not subject to any liability under the ADA or the Rehabilitation Act of 1973.

103. Attorney's fees

Inserts the above section "1977A" after "1977" in section 722 of 42 U.S.C. 1981.

104. Definitions

The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

The term "demonstrates" means meets the burdens of production and persuasion.

The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 717.

105. Burden of proof in disparate impact cases

Reverses *Wards Cove Packing Co. v Atonio* and *Price Waterhouse v Hopkins* by establishing the respective burdens of proof in disparate impact and mixed-motive disparate treatment cases under Title VII.

A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional (disparate treatment) discrimination under this title.

Section 105 also clarifies that a rule barring the employment of individuals who engage in unlawful drug use is considered an unlawful employment practice *only* if it is adopted or applied *with intent to discriminate* on the basis of race, color, religion, national origin, or sex. House Report, Part 1, p. 44 says that this is intended to recognize the employer's need to have a work force unencumbered by illegal drug use, even if a practice excluding illegal drug users has a disparate impact on classes protected under Title VII.

Jury trials are not available in disparate impact cases, because compensatory and punitive damages may not be recovered in such cases.

The Supreme Court ruled in 1989 that persons who claimed to be injured by disparate impact discrimination had to prove that the challenged practices were not significantly related to legitimate business objectives *(Wards Cove Packing Co. v Atonio).*

Disparate impact claims typically allege that employment practices that are not discriminatory on their face operate to exclude qualified women and minorities disproportionately. In addition to overt discrimination, Title VII prohibits practices that are fair in form, but discriminatory in operation.

The CRA of 1991 reverses *Wards Cove* by adding a new provision to Title VII that establishes proof requirements for disparate impact claims. A complaining party—which may include the EEOC, the Attorney General, or an injured individual—must demonstrate that a covered employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, national origin, or sex. If the employer then demonstrates that the challenged practice is "job-related" for the position in question and consistent with "business necessity," the complaining party must demonstrate that an *alternative employment practice* with less of a disparate impact exists, and that the employer has refused to adopt it.

The *Wards Cove* decision transferred the burden of persuasion on the issue of justifying a practice with a disparate impact from employers to employees, leaving the employers with only a burden of production of evidence. One of the considerations that bear on the determination of which party should bear the burden of proof of a particular fact is which party has access to the underlying information. Employers typically are in the best position to know what practices are required by business necessity. In all but the rarest instances, evidence regarding the existence of an adequate justification for an exclusionary practice is in the possession of the employer (Senate Report, pp. 16, 18). The CRA of 1991 reestablishes the proof formula in effect before *Wards Cove*. The complaining party has the initial burden of demonstrating the discriminatory impact of a challenged practice or group of practices, shifting the burden to the employer to show that the practice is required by business necessity. Before *Wards Cove*, an employer had to demonstrate that an employment practice having a disparate impact was justified by business necessity. Employers must now prove that their discriminatory practices, including strength standards, tests, educational requirements, leave or other personnel policies, or other subjective or objective evaluation procedures or practices, are required by business necessity.

The terms "business necessity" and "job related" are intended to reflect the concepts enunciated by the Supreme Court in *Griggs v Duke Power Co.* and other Supreme Court decisions prior to *Wards Cove* (Interpretative Memorandum 137, Congressional Record, 10/25/91). The complaining party may then rebut the employer's defense by demonstrating the availability of a less discriminatory alternative.

As amended by the CRA of 1991, Title VII also provides that, if an employer demonstrates that an employment practice does not cause a disparate impact, it is not required to demonstrate that the practice is required by business necessity. The practical question is whether use of the practice in dispute is significantly more likely to produce an effective work force than other, less discriminatory alternatives. Actual job performance may include such considerations as productivity and work quality. The aspect of the job performance measured by the practice must be important when examined in the context of the employees' total duties (Senate Report, p. 44). However, an employer's burden to demonstrate business necessity is not satisfied by general statements regarding a company's judgment or a selecting official's personal belief that a test or job requirement would improve the overall quality of the work force or benefit plant operations. Evidence offered to show business necessity must directly address the necessity of the practice for the particular job for which it is utilized. However, evidence that a given test is required to measure effective job performance for a specific position is not necessarily sufficient to prove the same test

is valid for a different job. Furthermore, a demonstration of business necessity must deal with the manner in which a test or job requirement is used. For example, it is not sufficient to justify a strength requirement for fire fighters by stating that fire-fighting activities require physical strength. The degree of strength actually required for effective job performance must be shown (Senate Report, p. 44).

Before *Wards Cove*, there was no need for employees to prove the extent to which any of several criteria might have contributed to an employment decision having a discriminatory effect.

By making employees bear the burden of producing evidence controlled by employers, *Wards Cove* made it impossible for aggrieved employees to maintain disparate impact claims when multiple selection criteria were used under circumstances in which the factors responsible for the disparate impact could not be ascertained (Senate Report, pp. 20, 45-46). An employer could defeat a disparate impact claim simply by failing to maintain or produce the relevant records or information.

As amended by the CRA of 1991, Title VII requires a complaining party to demonstrate that each particular challenged employment practice causes a disparate impact. However, if the complaining party can demonstrate that the elements of an employer's decision-making process are incapable of being separated for analysis, the decision-making process may be analyzed as one employment practice. When a decision-making process includes practices that are components of the same criterion, standard, method of administration, or test—such as the height and weight requirements designed to measure strength—the particular practices may be analyzed as a single employment practice (Interpretive Memorandum 137, Congressional Record, 10/25/91). Thus, an employer may defend against a challenge to a group of employment practices either by proving that the group of practices is required by business necessity or by proving that each specific practice within the group does not contribute to the disparate impact or is justified by business necessity.

The CRA of 1991 has no effect on the *Wards Cove* rule requiring claimants in disparate impact cases to compare job category compositions with qualified labor market or applicant pool compositions rather than with other job category compositions.

The legislation is intended to apply also to those antidiscrimination laws that have been modeled after and interpreted consistently with Title VII. Thus, disparate impact claims brought under the ADEA or the ADA should be treated in the same manner as under Title VII as amended (House Report, Part 2, p. 4). However, the CRA of 1991 is not intended to apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was made after October 30, 1983.

These dates specifically exclude the *Wards Cove* ruling itself. Although the principles enunciated in *Wards Cove* have been reversed, the parties to that case will not be affected by the new legislation.

106. Prohibition against discriminatory use of test scores

In connection with the selection or referral of applicants or candidates for employment or promotion, prohibits a covered employer from adjusting test scores, using

different cutoff scores, or other alterations of test scores and other discriminatory employee-selection procedures on the basis of race, color, religion, sex, or national origin.

The new Title VII language referring to employment tests prevents the practice of "race norming" and other practices that give unfair advantages to classes protected by Title VII, but does not alter existing legal requirements that employment tests operate fairly without regard to sex or minority status. Furthermore, since it only applies to employment-related tests, it does not have bearing on disparate impact cases where the employment-relatedness of tests is at issue and, therefore, not established.

Nothing in the amendments mandated by the CRA of 1991 (Title II) may be construed to affect *lawful affirmative action*, whether the affirmative action is mandatory or voluntary. The CRA of 1991 reiterates that lawful affirmative-action measures are not subject to challenges alleging discrimination against classes other than those the measures are designed to benefit. However, modification of test scores or use of different cutoff scores for the benefit of a class protected under Title VII is not a lawful affirmative-action measure.

107. Clarifying prohibition against impermissible consideration of race, color, religion, sex, or national origin in employment practices

Amends section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2). An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

If a violation is proved (the complaining party has met its burden of production and persuasion on a claim of mixed-motive disparate-treatment discrimination), and the respondent can prove that the action taken would have been taken *even in the absence of* the impermissible motivating factor, the court can grant declaratory relief, injunctive relief, and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of the claim under section 703; the court shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

The Supreme Court held in 1989 that, where an employee demonstrated that an employment decision was motivated in part by an unlawful discriminatory reason, the employer could avoid liability by demonstrating that the same decision would have been made even in the absence of the discriminatory reason *(Price Waterhouse v Hopkins)*. For example, a female job applicant rejected by a foreman who announced that he would never hire a woman, that the position was for men only, and that he did not care that Federal law prohibits sex discrimination, had no cause of action if, unbeknownst to the foreman, the employer had imposed a hiring freeze because of lack of business.

The CRA of 1991 reverses *Price Waterhouse* by amending Title VII to clarify the proof requirements with regard to alleged "mixed motive" discrimination. A complaining party may establish that an employment practice is unlawful by demon-

strating that a characteristic protected by Title VII was a "motivating factor" in the practice, even though other factors also motivated the practice.

To establish liability under Title VII, as amended by the CRA of 1991, the employee must demonstrate that prohibited discrimination *actually contributed* to the employer's decision. While virtually every Title VII disparate treatment case entails multiple motives to some degree, conduct or statements regarding race or gender are relevant only if the complaining party shows a connection between the conduct or statements and the employment decision at issue. Isolated or stray remarks not shown to have contributed to the employment decision are not sufficient to establish liability (House Report, Part 1, p. 48).

In effect, employers are now liable for any reliance on prejudice in making employment decisions, and may be subject to an order granting declaratory relief, injunctive relief, or attorney's fees and costs, even though the employee may not be entitled to damages or an order requiring admission, reinstatement, hiring, promotion, or back pay. The legislation is intended to apply also to those antidiscrimination laws that have been modeled after and interpreted consistently with Title VII. Thus, mixed-motive discrimination claims brought under the Americans with Disabilities Act or the ADEA should be treated in the same manner as under Title VII.

The amendments do not affect the Supreme Court's holding in *Price Waterhouse* that evidence of sexual stereotyping is sufficient to prove gender discrimination, and that an employer's burden to establish that it would have made the same decision in the absence of discrimination must be met by a preponderance of the evidence, rather than by clear and convincing evidence.

108. Facilitating prompt and orderly resolution of challenges to employment practices implementing litigated or consent judgments or orders

Amends section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) by clarifying the circumstances under which litigated or consent judgments or orders may be challenged.

The Supreme Court held in 1989 that persons who were not parties to judicially approved consent decrees, but were adversely affected by them, could challenge them in separate lawsuits *(Martin v Wilks)*. The effect of *Wilks* was to remove any possibility of finality with respect to a decree in a Title VII case after lengthy negotiations and consent or after full litigation (Senate Report, p. 26). In theory, a new employment discrimination suit could be filed every time an employer hired or promoted an individual pursuant to an approved court decree, effectively discouraging employers from ever agreeing to resolve Title VII cases by means of consent decrees. Parties who wished to bind other persons to a judgment resolving a suit on hiring and promotion decisions had to join not only every person currently employed by the employer, but every person who might seek to be hired or promoted by the employer during the pendency of the decree.

Before *Wilks*, the majority of Federal courts adopted a rule precluding all challenges to Title VII consent decrees entered by courts, finding that perpetual

challenge to such decrees substantially undermined their effectiveness as a mechanism for settling claims and that such decrees have played a critical role in providing relief to thousands of victims of systemic employment discrimination.

The CRA of 1991 reverses *Martin v Wilks* (Senate Report, pp. 7, 49). It amends Title VII to bar, under certain circumstances, challenges to employment practices that implement, and are within the scope of, litigated or consent judgments or orders resolving employment discrimination claims under either the Constitution or Federal antidiscrimination laws. These employment practices may not be challenged by:

- those who had actual notice that a proposed judgment or order might adversely affect their rights and had notice that there was an opportunity to present objections to the judgment or order by a certain date, with a reasonable opportunity to present such objections; or
- those whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds under similar factual circumstances, unless there was an intervening change in law or fact.

This amendment does *not:*

- alter the standard for intervention under the Federal Rules of Civil Procedure;
- apply to the rights of the parties to an action in which a litigated or consent judgment or order was entered, the rights of members of the class represented or sought to be represented in the action, or to the rights of members of a group on whose behalf relief was sought by the Federal government;
- prevent challenges to a litigated or consent judgment or order on the grounds that it was obtained through collusion or fraud, is invalid, or was entered by a court lacking jurisdiction; or
- authorize the denial of due process required by the Constitution.

The amendment represents the middle ground between the overly expansive rule enunciated in *Wilks* and the overly restrictive rule that was followed prior to *Wilks,* thus balancing the rights of nonlitigants against the need for finality of judgments and prompt relief from discrimination. In addition, the amendment supports the principle that third parties should decide for themselves whether to enter pending litigation. The amendment also meets the standards established in Rule 23 of the Federal Rules of Civil Procedure, under which a member of a class represented by individual representatives in a class action is barred from bringing a subsequent suit on claims that were determined with finality in the class action.

Actions not precluded by Title VII, as amended by the CRA of 1991, must be brought in the court (and if possible before the judge) that entered the judgment or order. The amendment has no effect on transferability under the Federal venue statute's provision governing change of venue. Due process requirements vary with the circumstances of each case, depending on such factors as the nature of third parties' interests, the probability that their interests would be affected by the litigation, as well as the expense, practicality, and likelihood of success of various alterna-

tive forms of notice. Whether notice is sufficient should be determined on a case-by-case basis by the court entering the decree (House Report, Part 1, p. 58).

109. Protection of extraterritorial employment

Extends the coverage of Title VII of the Civil Rights Act of 1964 to extraterritorial employment. The Supreme Court held earlier in 1991 that Americans working abroad for U.S. firms were not protected by Title VII *(EEOC v Arabian American Oil Co.)*.

The CRA of 1991 expands the definition of employees protected by both Title VII and the Americans with Disabilities Act. Title VII and the ADA now protect citizens of the United States employed by businesses in foreign countries. If an employer controls a corporation incorporated in a foreign country, any violation of Title VII or the ADA engaged in by the corporation is presumed to be engaged in by the employer. However, it is not unlawful for an employer to take any action that would otherwise be unlawful under Title VII or the ADA with respect to an employee working in a foreign country if compliance with Title VII or the ADA would cause the employer to *violate the law of the country in which the employee works.* Furthermore, the prohibitions of Title VII and the ADA do not apply to the foreign operations of an employer that is *a foreign person not controlled by an American employer.* This applies to employers, corporations controlled by employers, labor organizations, employment agencies, and joint management committees.

The determination of whether an employer controls the corporation must be based on:

- the interrelation of operations;
- the common management;
- the centralized control of labor relations; and
- the common ownership or financial control of the employer and the corporation.

The CRA of 1991's amendments regarding coverage of extraterritorial employment do not apply to conduct occurring before the date of enactment of the CRA.

110. Technical Assistance Training Institute

Amends section 705 of the CRA of 1964 (Title VII). Mandates the establishment of the Equal Employment Opportunity Commission's Technical Assistance Training Institute, to provide technical assistance and training regarding the laws and regulations enforced by the Commission.

Employers and others covered under this title are *not* excused from compliance with requirements because of any failure to receive technical assistance under this subsection.

111. Education and outreach

Enhances Title VII's provisions regarding education and outreach, including dissemination of information in languages other than English, to target individuals who historically have been victims of employment discrimination, those who have not been equitably served by the EEOC, and those on whose behalf the EEOC is authorized to enforce any other law prohibiting discrimination in employment.

112. Expansion of right to challenge discriminatory seniority systems

The Supreme Court held in 1989 that the statute of limitations for filing charges challenging discriminatory seniority plans began to run when a plan was *adopted* rather than when a plan was discriminatorily applied to an aggrieved individual *(Lorance v AT&T Technologies, Inc.)*.

Under *Lorance*, persons harmed by discriminatory seniority plans could be forever barred from filing claims before they were actually harmed by the application of seniority plans. Employees who sought to protect their interests were required to challenge immediately any new seniority rule or practice that might conceivably be applied adversely to them or lose forever the right to do so.

The CRA of 1991 reverses *Lorance* by amending section 706(e) of CRA of 1964 (42 U.S.C. 2000e-5(e) to expand the time within which a seniority system that has been adopted for an intentionally discriminatory purpose may be challenged in an administrative charge. For purposes of filing a charge, an unlawful employment practice occurs *when* the seniority system is adopted, *when* an individual becomes subject to the seniority system, *or when* a person is injured by the application of the system or a provision of the system.

The Senate Committee Report (p. 54) states that where an employer adopts a seniority rule or practice with an unlawful discriminatory motive, each application of the rule or practice is a new violation of the law. However, an old act of discrimination does not create a fresh cause of action every time it results in additional harm. The injury must be brought about by a new application of the challenged practice or decision.

113. Authorizing award of expert fees

The Supreme Court ruled previously that the taxable costs recoverable in Federal antidiscrimination law cases under the Civil Rights Attorney's Fees Awards Act of 1976 did not include expert witness fees in *excess* of the limits on fees for other types of witnesses *(Crawford Fitting Co. v J.T. Gibbons, Inc.; West Virginia University Hospital, Inc. v Casey)*.

However, the CRA of 1991 reverses these decisions by amending Section 722 of the Revised Statutes and section 706(k) of the CRA of 1964 (42 U.S.C. 2000e-5(k). The court, in its discretion, may include expert fees (not limited) as part of the attorney's fee.

114. Providing for interest and extending the statute of limitations in actions against the Federal government

Prior to amendment by the CRA of 1991, Title VII provided that the period of limitations for filing a civil complaint against the Federal government was 30 days after receipt of notice of final action on an administrative charge, while the limitations period for filing a civil complaint against a party *other* than the Federal government was 90 days after receipt of notice from the EEOC or the Attorney General of right to sue. The CRA of 1991 amends Title VII by extending the limitations period for Federal government complaints to 90 days. Claimants in cases against the Federal government are now subject to a suit-filing limitations period of the same duration as the one that applies to all other types of Title VII claimants (cases involving nonpublic parties).

The Supreme Court held in 1986 that the doctrine of sovereign immunity prohibits the recovery of prejudgment interest to compensate for delays in obtaining relief against the Federal government (*Library of Congress v Shaw*). The CRA of 1991 reverses *Shaw* by amending Title VII to provide that the same amount of interest available to private-sector employees prevailing in civil actions to compensate for delay in payment may be recovered in claims against the Federal government. Title VII already allows prejudgment interest to be recovered from state and local governments.

115. Notice of limitations period under the Age Discrimination in Employment Act of 1967

Before amendment by the CRA of 1991, the statute of limitations for filing a civil complaint under the ADEA alleging nonwillful discrimination by nonfederal employers was two years following accrual of a claim, without reference to the completion of EEOC administrative proceedings.

Unlike Title VII claimants, who were subject to a limitations period that starts running on receipt of notice of right to sue at the conclusion of the EEOC's administrative proceedings, an ADEA claimant could find that the period for filing a complaint had been largely consumed by the EEOC's efforts to resolve the claim administratively.

The CRA of 1991 amends the ADEA to provide that where an age discrimination charge filed with the EEOC is dismissed, or the proceedings are otherwise terminated by the EEOC, the EEOC must notify the charging party, who then may bring a civil action against the employer named in the charge within 90 days after having received notice from the EEOC. Furthermore, the ADEA no longer provides for tolling of the limitations period while the Secretary of Labor attempts to effect voluntary compliance through informal methods of conciliation, conference, and persuasion. Thus, the CRA of 1991 brings the ADEA in line with Title VII by providing

a comparable period of limitations for instituting civil actions on charges filed with the EEOC—the running of which is started by the same triggering event—and by requiring notice of termination of administrative proceedings to be given to claimants.

116. Lawful court-ordered remedies, affirmative action, and conciliation agreements not affected

Nothing in Title II of the CRA of 1991 is intended to affect court-ordered remedies, affirmative action, or conciliation agreements that are in accordance with the law.

117. Coverage of House of Representatives and the agencies of the legislative branch

Under the CRA of 1991, the rights and protections provided under Title VII apply to employment by the House or any employing authority of the House. Furthermore, the remedies and procedures provided under the House's Fair Employment Practices Resolution, and any other provision that continues the effect of the resolution, apply exclusively.

The Fair Employment Practices Resolution established the Office of Fair Employment Practices to provide counseling for, to mediate, to conduct hearings on, and to resolve unfair employment practices.

The House of Representatives' commitment to the remedies and procedures provided under the Fair Employment Practices Resolution (¶ 702) is an exercise of its rule-making power. The House may change its rules in the same manner as any other rule of the House.

The rights and protections provided under Title VII also apply to employment by each instrumentality of Congress (except as to employees who are also Senate employees). These instrumentalities include the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the United States Botanic Garden.

The chief official of each instrumentality of Congress must establish remedies and procedures for enforcing the rights and protections provided under Title VII as amended by the CRA of 1991, and submit to Congress a report describing the remedies and procedures.

Nothing in the CRA of 1991 alters the enforcement procedures available for individuals protected under section 717 of Title VII (those employed in military departments, executive agencies, the United States Postal Service and Postal Rate Commission, units of the Government of the District of Columbia in the competitive service, units in the legislative and judicial branches of the Federal government in the competitive service, and the Library of Congress).

118. Alternative means of dispute resolution

The CRA of 1991 encourages the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, fact-finding, minitrials, and arbitration, where appropriate and to the extent authorized by law.

House Report, Part 2, p. 41 states, nevertheless, that the use of alternative dispute resolution mechanisms should *supplement* rather than *supplant* the remedies provided by Title VII. Thus, an agreement to submit disputes to arbitration does not preclude actions for relief under Title VII.

TITLE II: GLASS CEILING

Title II (Act § 201 et seq.), entitled the Glass Ceiling Act of 1991 (GCA), establishes the Glass Ceiling Commission and establishes an annual award to promote a more diverse workforce at the management and decision-making levels.

201. Short title

Cites title as the "Glass Ceiling Act of 1991."

202. Findings and purpose

In summary, finds that:

- despite their increased presence in the workplace, women and minorities remain underrepresented in management and decision-making positions in U.S. business;
- artificial barriers exist to their advancement;
- U.S. corporations increasingly rely on women and minorities to meet employment requirements;
- the Department of Labor's "Glass Ceiling Initiative" and report have raised public awareness of (a) the underrepresentation of women and minorities at the management and decision-making levels in the U.S.; (b) the underrepresentation of women and minorities in line functions; (c) their lack of access to credential-building developmental opportunities; and (d) the desirability of eliminating artificial barriers to their advancement;
- the establishment of a commission to examine such issues would help: (a) focus attention on the importance of eliminating artificial barriers to the advancement of women and minorities to management and decision-making positions; and (b) promote workforce diversity;
- a comprehensive study of how management and decision-making positions are filled, the developmental practices that foster qualifications for advancement, and the compensation and reward structures used in the corporate structure

would assist in establishing practices to promote opportunities for, and eliminate barriers to, the advancement of women and minorities; and

- a national award recognizing employers whose policies promote the advancement of women and minorities will foster their advancement by encouraging other companies and by providing specific guidelines to improve their employment opportunities.

The purpose of the title is to establish a Glass Ceiling Commission to study the manner in which business fills management and decision-making positions, the developmental experiences that foster advancement to such positions, and the compensation and reward structures currently in use in business; and to create an annual award for excellence, as described below.

203. Establishment of Glass Ceiling Commission

The commission is to conduct a study and prepare recommendations concerning eliminating artificial barriers to the advancement of women and minorities and increasing the opportunities and developmental experiences of women and minorities to foster their advancement to management and decision-making positions in business.

The Commission consists of twenty-one members, including:

- six individuals appointed by the President;
- six individuals appointed jointly by the Speaker of the House of Representatives and the Majority Leader of the Senate;
- four individuals, one each appointed by the Majority and Minority Leaders of the House of Representatives and the Majority and Minority Leaders of the Senate;
- two members of the House of Representatives appointed jointly by the Majority and Minority Leaders of the House;
- two members of the Senate appointed jointly by the Majority and Minority Leaders of the Senate; and
- the Secretary of Labor, serving as the chairperson.

Consideration shall be made of the background of appointed individuals in relation to organizations that represent women and minorities or that represent employment issues.

204. Research on advancement of women and minorities to management and decision-making positions in business

The Commission is to conduct a study of opportunities for, and artificial barriers to, the advancement of women and minorities in management and decision-making positions, and within 15 months after the GCA is enacted, prepare a report for submission to the President and the appropriate committees of Congress. The report must include findings and conclusions as well as recommendations for the promotion

of opportunities for and the elimination of artificial barriers to the advancement of women and minorities in management and decision-making positions in business. The Commission may conduct additional studies as necessary.

205. Establishment of the National Award for Diversity and Excellence in American Executive Management

The GCA also establishes the National Award for Diversity and Excellence in American Executive Management, to be awarded annually to a business that demonstrates a substantial effort to foster advancement in management and decision-making positions and to eliminate artificial barriers to advancement of women and minorities by promoting opportunities for and developmental experiences of women and minorities. The President or his designated representative will present the award, based on the recommendation of the Commission, in accordance with criteria to be determined by the Commission.

206. Powers of the commission

The Commission is authorized to:

- hold hearings, take and print testimony, enter contracts, and make expenditures;
- administer oaths or affirmations;
- obtain information from Federal agencies;
- accept the voluntary services of a Commission member;
- accept gifts or donations;
- use the United States mails in the same manner as Federal agencies; and
- take any other action determined to be necessary.

207. Confidentiality of information

The Commission must maintain the confidentiality of any information regarding individual employees or the employment practices and procedures of individual businesses and may not disclose such information without the prior written consent of the business or employee. Information about aggregate employment practices or procedures of a class or group of businesses and information about the aggregate characteristics of employees may be disclosed without prior written consent.

208. Staff and consultants

The Commission may appoint and compensate such staff as it determines to be necessary, within rate limitations. It may hire experts and consultants. It may request

that employees of Federal agencies be detailed to it, and the head of any Federal agency shall provide such technical assistance as the Commission requests.

209. Authorization of appropriations

Authorizes such sums as may be necessary to carry out the provisions of this title.

210. Termination

The existence of the Commission and the authority to present the National Award for Diversity and Excellence in American Executive Management will terminate four years after the enactment of the GCA.

TITLE III: GOVERNMENT EMPLOYEE RIGHTS

Title VII, the ADEA, and the Rehabilitation Act of 1973 do not expressly cover the employment practices of Congress or presidential appointing authorities. While the Americans with Disabilities Act contains provisions covering the Senate, the House of Representatives, and the instrumentalities of Congress, it does not expressly cover presidential appointments. Moreover, the definitions of employees protected under Title VII and the ADEA exclude the employees of persons elected to public office in any state or political subdivision, as well as the personal staff members, policy-making appointees, and immediate advisors of such officials on matters regarding their constitutional or legal powers.

301. Government Employee Rights Act of 1991

Title III (Act § 301 et seq.), entitled the Government Employee Rights Act of 1991 (GERA), provides procedures to protect the rights of Senate and other government employees to be free from discrimination on the basis of race, color, religion, national origin, sex, and disability.

Senate employees protected under GERA include: employees whose pay is disbursed by the Secretary of the Senate; employees of the Architect of the Capitol assigned to the Senate Restaurants or to the Superintendent of the Senate Office Buildings; applicants for employment by a covered Senate entity for 90 days or longer; and former employees with discrimination claims arising from Senate employment.

302. Discriminatory practices prohibited

GERA mandates that the ban on employment discrimination based on race, color, religion, sex, or national origin under Title VII, on age under the ADEA, and on

handicap or disability discrimination under § 501 of the Rehabilitation Act of 1973 and the ADA, applies to all personnel actions affecting employees of the Senate.

303. Establishment of Office of Senate Fair Employment Practices

The Senate has exclusive jurisdiction over the enforcement of GERA with respect to discriminatory practices in Senate employment and adjudication of complaints alleging discrimination. (Act § 314) GERA establishes the Office of Senate Fair Employment Practices to administer the complaint process for complaints alleging unlawful discrimination in Senate employment.

304. Senate procedure for consideration of alleged violations

The procedure for considering complaints of discrimination in Senate employment consists of four steps, including counseling, mediation, formal complaint, and review of a hearing-board decision.

305. Step I: counseling

A Senate employee alleging violation may request counseling by the Office, which must be requested within 180 days after the alleged discrimination, and for which a period of 30 days is allowed.

306. Step II: mediation

The employee may file a request for mediation, which must be done within 15 days after the end of the counseling period, and for which a period of 30 days is allowed.

307. Step III: formal complaint and hearing

The employee may file a formal complaint within 30 days after the employee's receipt of notice that the mediation period has ended, and request a hearing, for which GERA provides specific procedures regarding composition of hearing boards, dismissal of frivolous claims, discovery, subpoenas, decisions, remedies, and the effect of precedent and interpretations.

A hearing board finding that a violation of the prohibition against discrimination in Senate employment may order the same relief, with some exceptions, as would be appropriate under Title VII, § 1981, and the ADEA. Relief available under Title VII, § 1981, and the ADEA includes hiring or reinstatement, back pay, and any other equitable relief considered appropriate. However, a hearing board is not authorized to award punitive damages. Furthermore, any order requiring the payment

of money must be approved by a Senate resolution reported by the Committee on Rules and Administration.

Prejudgment interest is to successful claimants. The remedies that would be appropriate under Title VII, § 1981, and the ADEA may be recovered in cases arising from Senate employment.

308. Review by the Select Committee on Ethics

Review by the Select Committee on Ethics must be requested by a party within 10 days after receipt of a hearing board's decision or by the Office within five days after the period for a party's request for review has expired, and must be conducted in accordance with the GERA's procedures governing review, remand, final decisions, and written statements of reasons for decisions.

309. Judicial review

Any party injured by a final decision of the Select Committee on Ethics—or of the Office of Senate Fair Employment Practices if no timely request for review by the Select Committee was filed—may file a petition for review of the decision with the United States Court of Appeals for the Federal Circuit. An aggrieved party may be an employee or applicant for Senate employment or a member of the Senate who is required to reimburse the appropriate Federal account for payments made to remedy violations of GERA. The petition must be filed within 90 days after entry of the final decision and reviewed in accordance with the GERA's requirements regarding applicable laws and standard of review.

The CRA of 1991 makes no corresponding provision for judicial review of determinations regarding alleged discrimination in House of Representatives employment.

Attorney's fees may be recovered, in accordance with the standards prescribed under Title VII, by employees or applicants prevailing in cases involving Senate employment.

The CRA of 1991 has no comparable provision for recovery of attorney's fees by employees or applicants aggrieved by discrimination in House of Representatives employment.

310. Resolution of complaint

A complaint alleging discrimination in Senate employment may be resolved under GERA by the employee and the head of the employing office in accordance with the terms of dismissal or a written agreement subject to the approval of the Director of the Office of Senate Fair Employment Practices.

311. Costs of attending hearings

Prevailing claimants may be reimbursed for actual and reasonable costs of attending proceedings under GERA, consistent with Senate travel regulations and Senate Resolution 259.

312. Prohibition of intimidation

The courts have been split regarding the effect of the *Patterson* decision (¶ 202) on claims alleging retaliation for opposing employment discrimination that was unlawful under § 1981. The CRA of 1991's amendment of § 1981 is intended to cover such retaliation. Under GERA, intimidation of, or reprisal against, any employee for having exercised a right under GERA is an unlawful employment practice which may be remedied in the same manner as any other discriminatory practice prohibited under GERA.

313. Confidentiality

Except as otherwise provided under GERA, all counseling, mediation, hearings, hearing-board deliberations and decisions, and final decisions of the Select Committee must be kept confidential. The records and decisions of the hearing boards or the decisions of the Select Committee may be made public if required for the purpose of judicial review.

314. Exercise of rulemaking power

GERA's ban on discrimination in Senate employment and procedures for addressing discrimination complaints is an exercise of the Senate's rulemaking power. The Senate may change these rules in the same manner as any other rule of the Senate.

315. Technical and conforming amendments

Amends section 509 of the Americans with Disabilities Act of 1990 (inserts "except for the employees who are defined as Senate employees," etc.).

316. Political affiliation and place of residence

It is not unlawful to consider the party affiliation, domicile, or political compatibility of an employee or applicant in making employment decisions.

317. Other review

GERA's procedures governing commencement of judicial proceedings to redress alleged discrimination in Senate employment are exclusive.

318. Other instrumentalities of the Congress

Extends the same or comparable rights and remedies under this Title to employees of instrumentalities of the Congress.

319. Rule XLII of the Standing Rules of the Senate

GERA reaffirms the Senate's commitment to Rule XLII of the Standing Rules of the Senate, which prohibits members, officers, or employees from discriminating against individuals with respect to promotions, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, national origin, age, or physical handicap.

Under GERA, the Select Committee on Ethics retains full power to take disciplinary action against members, officers, or employees of the Senate for violations of Rule XLII of the Standing Rules of the Senate, in accordance with its authority under Senate resolution 338.

320. Coverage of Presidential appointees

GERA mandates that the protections enjoyed by Senate employees as to race, color, religion, sex, or national-origin discrimination under Title VII, as to age discrimination under the ADEA, and as to handicap or disability discrimination under § 501 of the Rehabilitation Act of 1973 and the ADA also apply to all personnel actions affecting presidential appointees.

GERA covers all units of the executive branch, including the Executive Office of the President, and protects officers, employees, and applicants seeking to become officers or employees, whether appointed by the President or any other appointing authority in the executive branch. This includes individuals not already protected under Title VII, the ADEA, § 501 of the Rehabilitation Act of 1973, or the ADA who are:

- appointed with the advice and consent of the Senate;
- appointed to an advisory committee as defined in the Federal Advisory Committee Act; or
- members of the uniformed services.

Any presidential appointee alleging a violation of GERA may file a complaint with the EEOC or with a body designated by presidential executive order. In accordance with the Administrative Procedure Act, the EEOC or other designated body

must determine whether a violation has occurred and issue a final order setting forth its determination and requiring appropriate relief if a violation is found.

Prejudgment interest is available to successful claimants alleging discrimination in executive-branch employment. The remedies that would be appropriate under Title VII, § 1981, and the ADEA are applicable to employment of presidential appointees.

Attorney's fees may be recovered, in accordance with the standards prescribed under Title VII, involving employment of presidential employees.

321. Coverage of previously exempt state employees

GERA mandates that the same ban on employment discrimination based on race, color, religion, sex, or national origin under Title VII, on age under the ADEA, and on handicap or disability under § 501 of the Rehabilitation Act of 1973 and the ADA that protect Senate employees also applies to all personnel actions affecting individuals chosen or appointed by persons elected to public office in any state or political subdivision of any state.

This covers individuals chosen or appointed to be members of the elected official's personal staff, to serve the elected official on the policy-making level, or to serve the elected official as immediate advisors with respect to the exercise of the constitutional or legal powers of the office.

Any individual chosen or appointed by a person elected to public office in any state or political subdivision of a state and alleging a violation of GERA may file a complaint with the EEOC or with a body designated by presidential executive order. In accordance with the Administrative Procedure Act, the EEOC or other designated body must determine whether a violation has occurred and issue a final order setting forth its determination, requiring appropriate relief if a violation was found.

Any party aggrieved by a final order of the EEOC or other designated body with respect to employment of presidential appointees or employment by elected state or local officials may petition for review by the Federal Circuit. Judicial review must be conducted in accordance with GERA's requirements governing applicable laws and standard of review.

Prejudgment interest is also available under the CRA of 1991 to successful claimants alleging discrimination in certain types of state and local government employment. The remedies that would be appropriate under Title VII, § 1981, and the ADEA are applicable to individuals chosen or appointed by persons elected to public office in any state or political subdivision of a state.

Attorney's fees may be recovered, in accordance with the standards prescribed under Title VII, involving employment by elected state or local officials.

322. Severability

Notwithstanding section 401 of this Act, if any provision of section 309 or 320(a)(3) is invalidated, both sections shall have no force and effect.

323. Payments by the President or a member of the Senate

Whenever a payment is made out of a Federal account on behalf of a member of the Senate as a remedy for an employment practice found to be unlawful under GERA, the member must reimburse the appropriate account within 60 days after the payment was made.

Whenever a payment is made out of a Federal account on behalf of the President as a remedy for an employment practice found to be unlawful under GERA, the President must reimburse the appropriate account within 60 days after the payment was made.

There is no provision in the CRA of 1991 applicable to the House comparable to the GERA provision requiring reimbursement by members of the Senate.

324. Reports of Senate committees

Each report accompanying a bill or joint resolution of a public character by any committee of the Senate (except those of Appropriations and Budget) shall contain a listing of the provisions of the bill or joint resolution that apply to Congress and an evaluation of the impact on Congress.

The provisions of this section are enacted by the Senate as an exercise of the rulemaking power of the Senate, with recognition of the right of the Senate to change its rules.

325. Intervention and expedited review of certain appeals

Any member of the Senate may intervene as a matter of right in any judicial proceeding to review a final decision of the Select Committee or of the Office for the sole purpose of determining the constitutionality of GERA's authorization of judicial actions.

Litigation involving a member of Congress may implicate the Speech or Debate Clause of the Constitution, which provides legislators with immunity from liability for damages arising from legitimate legislative activity.

The United States Court of Appeals for the Federal Circuit must determine any issue regarding the constitutionality of GERA's provisions providing for judicial review of final decisions of the EEOC or a designated body regarding employment of presidential appointees or of the Select Committee or the Office regarding Senate employment. Appeals of such decisions may be taken directly to the Supreme Court from any interlocutory or final judgment, decree, or order of the Federal Circuit.

TITLE IV: GENERAL PROVISIONS

Title IV (Act § 401 et seq.) contains general provisions regarding severability and the effective date of the CRA of 1991.

401. Severability

If any provision, amendment, or application of this Act is proved to be invalid, the remaining provisions, amendments, and applications of the Act shall not be affected.

402. Effective date

The CRA of 1991 and the amendments made by the CRA of 1991 are effective on the date of enactment.

CIVIL RIGHTS ACT OF 1991

TEXT OF MEASURE — S. 1745

As Approved by the House and Senate

November 7, 1991

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Civil Rights Act of 1991".

SEC. 2. FINDINGS.

The Congress finds that—

(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;

(2) the decision of the Supreme Court in Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and

(3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSES.

The purposes of this Act are—

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;

(2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989);

(3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and

(4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

TITLE I—FEDERAL CIVIL RIGHTS REMEDIES

SEC. 101. PROHIBITION AGAINST ALL RACIAL DISCRIMINATION IN THE MAKING AND ENFORCEMENT OF CONTRACTS.

Section 1977 of the Revised Statutes (42 U.S.C. 1981) is amended—

(1) by inserting "(a)" before "All persons within"; and

(2) by adding at the end the following new subsections:

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

SEC. 102. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION.

The Revised Statutes are amended by inserting after section 1977 (42 U.S.C. 1981) the following new section:

"SEC. 1977A. DAMAGES IN CASES OF INTENTIONAL DISCRIMINATION IN EMPLOYMENT.

'(a) Right of Recovery.—

'(1) Civil rights.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

'(2) Disability.—In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1)), respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and the regulations implementing section 501, or who violated the requirements of section 501 of the Act or the regulations implementing section 501 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

'(3) Reasonable accommodation and good faith effort.—In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant to section 102(b)(5) of the Americans with Disabilities Act of 1990 or regulations implementing section 501 of the Rehabilitation Act of 1973, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

"(b) Compensatory and Punitive Damages.—

"(1) Determination of punitive damages.—A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

"(2) Exclusions from compensatory damages.—Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964.

"(3) Limitations.—The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

"(A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

"(B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and

"(C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and

"(D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

"(4) Construction.—Nothing in this section shall be construed to limit the scope of, or the relief available under, section 1977 of the Revised Statutes (42 U.S.C. 1981).

"(c) Jury Trial.—If a complaining party seeks compensatory or punitive damages under this section—

"(1) any party may demand a trial by jury; and

"(2) the court shall not inform the jury of the limitations described in subsection (b)(3).

"(d) Definitions.—As used in this section:

"(1) Complaining party.—The term 'complaining party' means—

"(A) in the case of a person seeking to bring an action under subsection (a)(1), the Equal Employment Opportunity Commission, the Attorney General, or a person who may bring an action or proceeding under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); or

"(B) in the case of a person seeking to bring an action under subsection (a)(2), the Equal Employment Opportunity Commission, the Attorney General, a person who may bring an action or proceeding under section 505(a)(1) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)(1), or a person who may bring an action or proceeding under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.).

"(2) Discriminatory practice.—The term 'discriminatory practice' means the discrimination described in paragraph (1), or the discrimination or the violation described in paragraph (2), of subsection (a).

SEC. 103. ATTORNEY'S FEES.

The last sentence of section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting ", 1977A" after "1977".

SEC. 104. DEFINITIONS.

Section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e) is amended by adding at the end the following new subsections:

"(l) The term 'complaining party' means the Commission, the Attorney General, or a person who may bring an action or proceeding under this title.

"(m) The term 'demonstrates' means meets the burdens of production and persuasion.

"(n) The term 'respondent' means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 717."

SEC. 105. BURDEN OF PROOF IN DISPARATE IMPACT CASES.

(a) Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) is amended by adding at the end the following new subsection:

"(k)(1)(A) An unlawful employment practice based on disparate impact is established under this title only if—

"(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

"(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

"(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

"(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

"(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice'.

"(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this title.

"(3) Notwithstanding any other provision of this title, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act or any other provision of Federal law, shall be considered an unlawful employment practice under this title only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.".

(b) No statements other than the interpretive memorandum appearing at Vol. 137 Congressional Record S 15276 (daily ed. Oct. 25, 1991) shall be considered legislative history of, or relied upon in any way as legislative history in construing or applying, any provision of this Act that relates to Wards Cove—Business necessity/cumulation/alternative business practice.

SEC. 106. PROHIBITION AGAINST DISCRIMINATORY USE OF TEST SCORES.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by section 105) is further amended by adding at the end the following new subsection:

"(l) It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.".

SEC. 107. CLARIFYING PROHIBITION AGAINST IMPERMISSIBLE CONSIDERATION OF RACE, COLOR, RELIGION, SEX, OR NATION-

AL ORIGIN IN EMPLOYMENT PRACTICES.

(a) In General.—Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105 and 106) is further amended by adding at the end the following new subsection:

"(m) Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.".

(b) Enforcement Provisions.—Section 706(g) of such Act (42 U.S.C. 2000e-5(g)) is amended—

(1) by designating the first through third sentences as paragraph (1);

(2) by designating the fourth sentence as paragraph (2)(A) and indenting accordingly; and

(3) by adding at the end the following new subparagraph:

"(B) On a claim in which an individual proves a violation under section 703(m) and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court—

"(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 703(m); and

"(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).".

SEC. 108. FACILITATING PROMPT AND ORDERLY RESOLUTION OF CHALLENGES TO EMPLOYMENT PRACTICES IMPLEMENTING LITIGATED OR CONSENT JUDGMENTS OR ORDERS.

Section 703 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2) (as amended by sections 105, 106, and 107 of this title) is further amended by adding at the end the following new subsection:

"(n)(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

"(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws—

"(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had—

"(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

"(II) a reasonable opportunity to present objections to such judgment or order; or

"(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

"(2) Nothing in this subsection shall be construed to—

"(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

"(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

"(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

"(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

"(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of title 28, United States Code.".

SEC. 109. PROTECTION OF EXTRATERRITORIAL EMPLOYMENT.

(a) Definition of Employee.—Section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f)) and section 101(4) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(4)) are each amended by adding at the end the following: "With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.".

(b) Exemption.—

(1) Civil rights act of 1964.—Section 702 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1) is amended—

(A) by inserting "(a)" after "Sec. 702."; and

(B) by adding at the end the following:

"(b) It shall not be unlawful under section 703 or 704 for an employer (or a corporation controlled by an employer), labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining (including on-the-job training programs) to take any action otherwise prohibited by such section, with respect to an employee in a workplace in a foreign country if compliance with such section would cause such employer (or such corporation), such organization, such agency, or such committee to violate the law of the foreign country in which such workplace is located.

"(c)(1) If an employer controls a corporation whose place of incorporation is a foreign country, any practice prohibited by section 703 or 704 engaged in by such corporation shall be presumed to be engaged in by such employer.

"(2) Sections 703 and 704 shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(3) For purposes of this subsection, the determination of whether an employer controls a corporation shall be based on—

"(A) the interrelation of operations;

"(B) the common management;

"(C) the centralized control of labor relations; and

"(D) the common ownership or financial control, of the employer and the corporation.".

(2) Americans with disabilities act of 1990.—Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended—

(A) by redesignating subsection (c) as subsection (d); and

(B) by inserting after subsection (b) the following new subsection:

"(c) Covered Entities in Foreign Countries.—

"(1) In general.—It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to

violate the law of the foreign country in which such workplace is located.

"(2) Control of corporation.—

"(A) Presumption.—If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

"(B) Exception.—This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

"(C) Determination.—For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

"(i) the interrelation of operations;

"(ii) the common management;

"(iii) the centralized control of labor relations; and

"(iv) the common ownership or financial control, of the employer and the corporation.".

(c) Application of Amendments.—The amendments made by this section shall not apply with respect to conduct occurring before the date of the enactment of this Act.

SEC. 110. TECHNICAL ASSISTANCE TRAINING INSTITUTE.

(a) Technical Assistance.—Section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4) is amended by adding at the end the following new subsection:

"(j)(1) The Commission shall establish a Technical Assistance Training Institute, through which the Commission shall provide technical assistance and training regarding the laws and regulations enforced by the Commission.

"(2) An employer or other entity covered under this title shall not be excused from compliance with the requirements of this title because of any failure to receive technical assistance under this subsection.

"(3) There are authorized to be appropriated to carry out this subsection such sums as may be necessary for fiscal year 1992.".

(b) Effective Date.—The amendment made by this section shall take effect on the date of the enactment of this Act.

SEC. 111. EDUCATION AND OUTREACH.

Section 705(h) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4(h)) is amended—

(1) by inserting "(1)" after "(h)"; and

(2) by adding at the end the following new paragraph:

"(2) In exercising its powers under this title, the Commission shall carry out educational and outreach activities (including dissemination of information in languages other than English) targeted to—

"(A) individuals who historically have been victims of employment discrimination and have not been equitably served by the Commission; and

"(B) individuals on whose behalf the Commission has authority to enforce any other law prohibiting employment discrimination, concerning rights and obligations under this title or such law, as the case may be.".

SEC. 112. EXPANSION OF RIGHT TO CHALLENGE DISCRIMINATORY SENIORITY SYSTEMS.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended—

(1) by inserting "(1)" before "A charge under this section"; and

(2) by adding at the end the following new paragraph:

"(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this title (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.".

SEC. 113. AUTHORIZING AWARD OF EXPERT FEES.

(a) Revised Statutes.—Section 722 of the Revised Statutes is amended—

(1) by designating the first and second sentences as subsections (a) and (b), respectively, and indenting accordingly; and

(2) by adding at the end the following new subsection:

"(c) In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of sections 1977 or 1977A of the Revised Statutes, the court, in its discretion, may include expert fees as part of the attorney's fee.".

(b) Civil Rights Act of 1964.—Section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)) is amended by inserting "(including expert fees)" after "attorney's fee".

SEC. 114. PROVIDING FOR INTEREST AND EXTENDING THE STATUTE OF LIMITATIONS IN ACTIONS AGAINST THE FEDERAL GOVERNMENT.

Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended—

(1) in subsection (c), by striking "thirty days" and inserting '90 days'; and

(2) in subsection (d), by inserting before the period ", and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.".

SEC. 115. NOTICE OF LIMITATIONS PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended—

(1) by striking paragraph (2);

(2) by striking the paragraph designation in paragraph (1);

(3) by striking "Sections 6 and" and inserting "Section"; and

(4) by adding at the end the following: "If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice.".

SEC. 116. LAWFUL COURT-ORDERED REMEDIES, AFFIRMATIVE ACTION, AND CONCILIATION AGREEMENTS NOT AFFECTED.

Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law.

SEC. 117. COVERAGE OF HOUSE OF REPRESENTATIVES AND THE AGENCIES OF THE LEGISLATIVE BRANCH.

(a) Coverage of the House of Representatives.—

(1) In general.—Notwithstanding any provision of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or of other law, the purposes of such title shall, subject to paragraph (2), apply in their entirety to the House of Representatives.

(2) Employment in the house.—

(A) Application.—The rights and protections under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to subparagraph (B), apply with respect to any employee in an employment position in the House of Representatives and any employing authority of the House of Representatives.

(B) Administration.—

(i) In general.—In the administration of this paragraph, the remedies and procedures made applicable pursuant to the resolution described in clause (ii) shall apply exclusively.

(ii) Resolution.—The resolution referred to in clause (i) is the Fair Employment Practices Resolution (House Resolution 558 of the One Hundredth Congress, as agreed to October 4, 1988), as incorporated into the Rules of the House of Representatives of the One Hundred Second Congress as Rule LI, or any other provision that continues in effect the provisions of such resolution.

(C) Exercise of rulemaking power.—The provisions of subparagraph (B) are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives, with full recognition of the right of the House to change its rules, in the same manner, and to the same extent as in the case of any other rule of the House.

(b) Instrumentalities of Congress.—

(1) In general.—The rights and protections under this title and title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities.—The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1). Such remedies and procedures shall apply exclusively, except for the employees who are defined as Senate employees, in section 301(c)(1).

(3) Report to Congress.—The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentalities.—For purposes of this section, instrumentalities of the Congress include the following: the Architect of the Capitol, the Congressional Budget Office, the General Accounting Office, the Government Printing Office, the Office of Technology Assessment, and the United States Botanic Garden.

(5) Construction.—Nothing in this section shall alter the enforcement procedures for individuals protected under section 717 of title VII for the Civil Rights Act of 1964 (42 U.S.C. 2000e-16).

SEC. 118. ALTERNATIVE MEANS OF DISPUTE RESOLUTION.

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title.

TITLE II—GLASS CEILING

SEC. 201. SHORT TITLE.

This title may be cited as the "Glass Ceiling Act of 1991".

SEC. 202. FINDINGS AND PURPOSE.

(a) Findings.—Congress finds that—

(1) despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business;

(2) artificial barriers exist to the advancement of women and minorities in the workplace;

(3) United States corporations are increasingly relying on women and minorities to meet employment requirements and are increasingly aware of the advantages derived from a diverse work force;

(4) the "Glass Ceiling Initiative" undertaken by the Department of Labor, including the release of the report entitled "Report on the Glass Ceiling Initiative", has been instrumental in raising public awareness of—

(A) the underrepresentation of women and minorities at the management and decisionmaking levels in the United States work force;

(B) the underrepresentation of women and minorities in line functions in the United States work force;

(C) the lack of access for qualified women and minorities to credential-building developmental opportunities; and

(D) the desirability of eliminating artificial barriers to the advancement of women and minorities to such levels;

(5) the establishment of a commission to examine issues raised by the Glass Ceiling Initiative would help—

(A) focus greater attention on the importance of eliminating artificial barriers to the advancement of women and minorities to management and decisionmaking positions in business; and

(B) promote work force diversity;

(6) a comprehensive study that includes analysis of the manner in which management and decisionmaking positions are filled, the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement, and the compensation programs and reward structures utilized in the corporate sector would assist in the establishment of practices and policies promoting opportunities for, and eliminating artificial barriers to, the advancement of women and minorities to management and decisionmaking positions; and

(7) a national award recognizing employers whose practices and policies promote opportunities for, and eliminate artificial barriers to, the advancement of women and minorities will foster the advancement of women and minorities into higher level positions by—

(A) helping to encourage United States companies to modify practices and policies to promote opportunities for, and eliminate artificial barriers to, the upward mobility of women and minorities; and

(B) providing specific guidance for other United States employers that wish to learn how to revise practices and policies to improve the access and employment opportunities of women and minorities; and

(b) Purpose.—The purpose of this title is to establish—

(1) a Glass Ceiling Commission to study—

(A) the manner in which business fills management and decisionmaking positions;

(B) the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement into such positions; and

(C) the compensation programs and reward structures currently utilized in the workplace; and

(2) an annual award for excellence in promoting a more diverse skilled work force at the management and decisionmaking levels in business.

SEC. 203. ESTABLISHMENT OF GLASS CEILING COMMISSION.

(a) In General.—There is established a Glass Ceiling Commission (referred to in this title as the "Commission"), to conduct a study and prepare recommendations concerning—

(1) eliminating artificial barriers to the advancement of women and minorities; and

(2) increasing the opportunities and developmental experiences of women and minorities to foster advancement of women and minorities to management and decisionmaking positions in business.

(b) Membership.—

(1) Composition.—The Commission shall be composed of 21 members, including—

(A) six individuals appointed by the President;

(B) six individuals appointed jointly by the Speaker of the House of Representatives and the Majority Leader of the Senate;

(C) one individual appointed by the Majority Leader of the House of Representatives;

(D) one individual appointed by the Minority Leader of the House of Representatives;

(E) one individual appointed by the Majority Leader of the Senate;

(F) one individual appointed by the Minority Leader of the Senate;

(G) two Members of the House of Representatives appointed jointly by the Majority Leader and the Minority Leader of the House of Representatives;

(H) two Members of the Senate appointed jointly by the Majority Leader and the Minority Leader of the Senate; and

(I) the Secretary of Labor.

(2) Considerations.—In making appointments under subparagraphs (A) and (B) of paragraph (1), the appointing authority shall consider the background of the individuals, including whether the individuals—

(A) are members of organizations representing women and minorities, and other related interest groups;

(B) hold management or decisionmaking positions in corporations or other business entities recognized as leaders on issues relating to equal employment opportunity; and

(C) possess academic expertise or other recognized ability regarding employment issues.

(3) Balance.—In making the appointments under subparagraphs (A) and (B) of paragraph (1), each appointing authority shall seek to include an appropriate balance of appointees from among the groups of appointees described in subparagraphs (A), (B), and (C) of paragraph (2).

(c) Chairperson.—The Secretary of Labor shall serve as the Chairperson of the Commission.

(d) Term of Office.—Members shall be appointed for the life of the Commission.

(e) Vacancies.—Any vacancy occurring in the membership of the Commission shall be filled in the same manner as the original appointment for the position being vacated. The vacancy shall not affect the power of the remaining members to execute the duties of the Commission.

(f) Meetings.—

(1) Meetings prior to completion of report.—The Commission shall meet not fewer than five times in connection with and pending the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(2) Meetings after completion of report.—The Commission shall meet once each year after the completion of the report described in section 204(b). The Commission shall hold additional meetings if the Chairperson or a majority of the members of the Commission request the additional meetings in writing.

(g) Quorum.—A majority of the Commission shall constitute a quorum for the transaction of business.

(h) Compensation and Expenses.—

(1) Compensation.—Each member of the Commission who is not an employee of the Federal Government shall receive compensation at the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code, for each day the member is engaged in the performance of duties for the Commission, including attendance at meetings and conferences of the Commission, and travel to conduct the duties of the Commission.

(2) Travel expenses.—Each member of the Commission shall receive travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, for each day the member is engaged in the performance of duties away from the home or regular place of business of the member.

(3) Employment status.—A member of the Commission, who is not otherwise an employee of the Federal Government, shall not be deemed to be an employee of the Federal Government except for the purposes of—

(A) the tort claims provisions of chapter 171 of title 28, United States Code; and

(B) subchapter I of chapter 81 of title 5, United States Code, relating to compensation for work injuries.

SEC. 204. RESEARCH ON ADVANCEMENT OF WOMEN AND MINORITIES TO MANAGEMENT AND DECISIONMAKING POSITIONS IN BUSINESS.

(a) Advancement Study.—The Commission shall conduct a study of opportunities for, and artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business. In conducting the study, the Commission shall—

(1) examine the preparedness of women and minorities to advance to management and decisionmaking positions in business;

(2) examine the opportunities for women and minorities to advance to management and decisionmaking positions in business;

(3) conduct basic research into the practices, policies, and manner in which management and decisionmaking positions in business are filled;

(4) conduct comparative research of businesses and industries in which women and minorities are promoted to management and decisionmaking positions, and businesses and industries in which women and minorities are not promoted to management and decisionmaking positions;

(5) compile a synthesis of available research on programs and practices that have successfully led to the advancement of women and minorities to management and decisionmaking positions in business, including training programs, rotational assignments, developmental programs, reward programs, employee benefit structures, and family leave policies; and

(6) examine any other issues and information relating to the advancement of women and minorities to management and decisionmaking positions in business.

(b) Report.—Not later than 15 months after the date of the enactment of this Act, the Commission shall prepare and submit to the President and the appropriate committees of Congress a written report containing—

(1) the findings and conclusions of the Commission resulting from the study conducted under subsection (a); and

(2) recommendations based on the findings and conclusions described in paragraph (1) relating to the promotion of opportunities for, and elimination of artificial barriers to, the advancement of women and minorities to management and decisionmaking positions in business, including recommendations for—

(A) policies and practices to fill vacancies at the management and decisionmaking levels;

(B) developmental practices and procedures to ensure that women and minorities have access to opportunities to gain the exposure, skills, and expertise necessary to assume management and decisionmaking positions;

(C) compensation programs and reward structures utilized to reward and retain key employees; and

(D) the use of enforcement (including such enforcement techniques as litigation, complaint investigations, compliance reviews, conciliation, administrative regulations, policy guidance, technical assistance, training, and public education) of Federal equal employment opportunity laws by Federal agencies as a means of eliminating artificial barriers to the advancement of women and minorities in employment.

(c) Additional Study.—The Commission may conduct such additional study of the advancement of women and minorities to management and decisionmaking positions in business as a majority of the

members of the Commission determines to be necessary.

SEC. 205. ESTABLISHMENT OF THE NATIONAL AWARD FOR DIVERSITY AND EXCELLENCE IN AMERICAN EXECUTIVE MANAGEMENT.

(a) In General.—There is established the National Award for Diversity and Excellence in American Executive Management, which shall be evidenced by a medal bearing the inscription "Frances Perkins-Elizabeth Hanford Dole National Award for Diversity and Excellence in American Executive Management". The medal shall be of such design and materials, and bear such additional inscriptions, as the Commission may prescribe.

(b) Criteria for Qualification.—To qualify to receive an award under this section a business shall—

(1) submit a written application to the Commission, at such time, in such manner, and containing such information as the Commission may require, including at a minimum information that demonstrates that the business has made substantial effort to promote the opportunities and developmental experiences of women and minorities to foster advancement to management and decisionmaking positions within the business, including the elimination of artificial barriers to the advancement of women and minorities, and deserves special recognition as a consequence; and

(2) meet such additional requirements and specifications as the Commission determines to be appropriate.

(c) Making and Presentation of Award.—

(1) Award.—After receiving recommendations from the Commission, the President or the designated representative of the President shall annually present the award described in subsection (a) to businesses that meet the qualifications described in subsection (b).

(2) Presentation.—The President or the designated representative of the President shall present the award with such ceremonies as the President or the designated representative of the President may determine to be appropriate.

(3) Publicity.—A business that receives an award under this section may publicize the receipt of the award and use the award in its advertising, if the business agrees to help other United States businesses improve with respect to the promotion of opportunities and developmental experiences of women and minorities to foster the advancement of women and minorities to management and decisionmaking positions.

(d) Business.—For the purposes of this section, the term 'business' includes—

(1)(A) a corporation, including nonprofit corporations;

(B) a partnership;

(C) a professional association;

(D) a labor organization; and

(E) a business entity similar to an entity described in subparagraphs (A) through (D);

(2) an education referral program, a training program, such as an apprenticeship or management training program or a similar program; and

(3) a joint program formed by a combination of any entities discribed in paragraph 1 or 2.

SEC. 206. POWERS OF THE COMMISSION.

(a) In General.—The Commission is authorized to—

(1) hold such hearings and sit and act at such times;

(2) take such testimony;

(3) have such printing and binding done;

(4) enter into such contracts and other arrangements;

(5) make such expenditures; and

(6) take such other actions; as the Commission may determine to be necessary to carry out the duties of the Commission.

(b) Oaths.—Any member of the Commission may administer oaths or affirmations to witnesses appearing before the Commission.

(c) Obtaining Information from Federal Agencies.—The Commission may secure directly from any Federal agency such information as the Commission may require to carry out its duties.

(d) Voluntary Service.—Notwithstanding section 1342 of title 31, United States Code, the Chairperson of the Commission may accept for the Commission voluntary services provided by a member of the Commission.

(e) Gifts and Donations.—The Commission may accept, use, and dispose of gifts or donations of property in order to carry out the duties of the Commission.

(f) Use of Mail.—The Commission may use the United States mails in the same manner and under the same conditions as Federal agencies.

SEC. 207. CONFIDENTIALITY OF INFORMATION.

(a) Individual Business Information.—

(1) In general.—Except as provided in paragraph (2), and notwithstanding section 552 of title 5, United States Code, in carrying out the duties of the Commission, including the duties described in sections 204 and 205, the Commission shall maintain the confidentiality of all information that concerns—

(A) the employment practices and procedures of individual businesses; or

(B) individual employees of the businesses.

(2) Consent.—The content of any information described in paragraph (1) may be disclosed with the prior written consent of the business or employee, as the case may be, with respect to which the information is maintained.

(b) Aggregate Information.—In carrying out the duties of the Commission, the Commission may disclose—

(1) information about the aggregate employment practices or procedures of a class or group of businesses; and

(2) information about the aggregate characteristics of employees of the businesses, and related aggregate information about the employees.

SEC. 208. STAFF AND CONSULTANTS.

(a) Staff.—

(1) Appointment and compensation.—The Commission may appoint and determine the compensation of such staff as the Commission determines to be necessary to carry out the duties of the Commission.

(2) Limitations.—The rate of compensation for each staff member shall not exceed the daily equivalent of the rate specified for level V of the Executive Schedule under section 5316 of title 5, United States Code for each day the staff member is engaged in the performance of duties for the Commission. The Commission may otherwise appoint and determine the compensation of staff without regard to the provisions of title 5, United States Code, that govern appointments in the competitive service, and the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, that relate to classification and General Schedule pay rates.

(b) Experts and Consultants.—The Chairperson of the Commission may obtain such temporary and intermittent services of experts and consultants and compensate the experts and consultants in accordance with section 3109(b) of title 5, United States Code, as the Commission determines to be necessary to carry out the duties of the Commission.

(c) Detail of Federal Employees.—On the request of the Chairperson of the Commission, the head of any Federal agency shall detail, without reimbursement, any of the personnel of the agency to the Commission to assist the Commission in carrying out its duties. Any detail

shall not interrupt or otherwise affect the civil service status or privileges of the Federal employee.

(d) Technical Assistance.—On the request of the Chairperson of the Commission, the head of a Federal agency shall provide such technical assistance to the Commission as the Commission determines to be necessary to carry out its duties.

SEC. 209. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Commission such sums as may be necessary to carry out the provisions of this title. The sums shall remain available until expended, without fiscal year limitation.

SEC. 210. TERMINATION.

(a) Commission.—Notwithstanding section 15 of the Federal Advisory Committee Act (5 U.S.C. App.), the Commission shall terminate 4 years after the date of the enactment of this Act.

(b) Award.—The authority to make awards under section 205 shall terminate 4 years after the date of the enactment of this Act.

TITLE III—GOVERNMENT EMPLOYEE RIGHTS

SEC. 301. GOVERNMENT EMPLOYEE RIGHTS ACT OF 1991.

(a) Short Title.—This title may be cited as the "Government Employee Rights Act of 1991".

(b) Purpose.—The purpose of this title is to provide procedures to protect the right of Senate and other government employees, with respect to their public employment, to be free of discrimination on the basis of race, color, religion, sex, national origin, age, or disability.

(c) Definitions.—For purposes of this title:

(1) Senate employee.—The term "Senate employee" or "employee" means—

(A) any employee whose pay is disbursed by the Secretary of the Senate;

(B) any employee of the Architect of the Capitol who is assigned to the Senate Restaurants or to the Superintendent of the Senate Office Buildings;

(C) any applicant for a position that will last 90 days or more and that is to be occupied by an individual described in subparagraph (A) or (B); or

(D) any individual who was formerly an employee described in subparagraph (A) or (B) and whose claim of a violation arises out of the individual's Senate employment.

(2) Head of employing office.—The term "head of employing office" means the individual who has final authority to appoint, hire, discharge, and set the terms, conditions or privileges of the Senate employment of an employee.

(3) Violation.—The term "violation" means a practice that violates section 302 of this title.

SEC. 302. DISCRIMINATORY PRACTICES PROHIBITED.

All personnel actions affecting employees of the Senate shall be made free from any discrimination based on—

(1) race, color, religion, sex, or national origin, within the meaning of section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(2) age, within the meaning of section 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a); or

(3) handicap or disability, within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791) and sections 102-104 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112-14).

SEC. 303. ESTABLISHMENT OF OFFICE OF SENATE FAIR EMPLOYMENT PRACTICES.

(a) In General.—There is established, as an office of the Senate, the Office of Senate Fair Employment Practices (referred to in this title as the "Office'), which shall—

(1) administer the processes set forth in sections 305 through 307;

(2) implement programs for the Senate to heighten awareness of employee rights in order to prevent violations from occurring.

(b) Director.—

(1) In general.—The Office shall be headed by a Director (referred to in this title as the "Director') who shall be appointed by the President pro tempore, upon the recommendation of the Majority Leader in consultation with the Minority Leader. The appointment shall be made without regard to political affiliation and solely on the basis of fitness to perform the duties of the position. The Director shall be appointed for a term of service which shall expire at the end of the Congress following the Congress during which the Director is appointed. A Director may be reappointed at the termination of any term of service. The President pro tempore, upon the joint recommendation of the Majority Leader in consultation with the Minority Leader, may remove the Director at any time.

(2) Salary.—The President pro tempore, upon the recommendation of the Majority Leader in consultation with the Minority Leader, shall establish the rate of pay for the Director. The salary of the Director may not be reduced during the employment of the Director and shall be increased at the same time and in the same manner as fixed statutory salary rates within the Senate are adjusted as a result of annual comparability increases.

(3) Annual budget.—The Director shall submit an annual budget request for the Office to the Committee on Appropriations.

(4) Appointment of director.—The first Director shall be appointed and begin service within 90 days after the date of enactment of this Act, and thereafter the Director shall be appointed and begin service within 30 days after the beginning of the session of the Congress immediately following the termination of a Director's term of service or within 60 days after a vacancy occurs in the position.

(c) Staff of the Office.—

(1) Appointment.—The Director may appoint and fix the compensation of such additional staff, including hearing officers, as are necessary to carry out the purposes of this title.

(2) Detailees.—The Director may, with the prior consent of the Government department or agency concerned and the Committee on Rules and Administration, use on a reimbursable or nonreimbursable basis the services of any such department or agency, including the services of members or personnel of the General Accounting Office Personnel Appeals Board.

(3) Consultants.—In carrying out the functions of the Office, the Director may procure the temporary (not to exceed 1 year) or intermittent services of individual consultants, or organizations thereof, in the same manner and under the same conditions as a standing committee of the Senate may procure such services under section 202(i) of the Legislative Reorganization Act of 1946 (2 U.S.C. 72a(i)).

(d) Expenses of the Office.—In fiscal year 1992, the expenses of the Office shall be paid out of the Contingent Fund of the Senate from the appropriation account Miscellaneous Items. Beginning in fiscal year 1993, and for each fiscal year thereafter, there is authorized to be appropriated for the expenses of the Office such sums as shall be necessary to carry out its functions. In all cases, expenses shall be paid out of the Contingent Fund of the Senate upon vouchers approved by the Director, except that a voucher shall not be required for—

(1) the disbursement of salaries of employees who are paid at an annual rate;

(2) the payment of expenses for telecommunications services provided by the Telecommunications Department, Sergeant at Arms, United States Senate;

(3) the payment of expenses for stationery supplies purchased through the Keeper of the Stationery, United States Senate;

(4) the payment of expenses for postage to the Postmaster, United States Senate; and

(5) the payment of metered charges on copying equipment provided by the Sergeant at Arms, United States Senate. The Secretary of the Senate is authorized to advance such sums as may be necessary to defray the expenses incurred in carrying out this title. Expenses of the Office shall include authorized travel for personnel of the Office.

(e) Rules of the Office.—The Director shall adopt rules governing the procedures of the Office, including the procedures of hearing boards, which rules shall be submitted to the President pro tempore for publication in the Congressional Record. The rules may be amended in the same manner. The Director may consult with the Chairman of the Administrative Conference of the United States on the adoption of rules.

(f) Representation by the Senate Legal Counsel.—For the purpose of representation by the Senate Legal Counsel, the Office shall be deemed a committee, within the meaning of title VII of the Ethics in Government Act of 1978 (2 U.S.C. 288, et seq.).

SEC. 304. SENATE PROCEDURE FOR CONSIDERATION OF ALLEGED VIOLATIONS.

The Senate procedure for consideration of alleged violations consists of 4 steps as follows:

(1) Step I, counseling, as set forth in section 305.

(2) Step II, mediation, as set forth in section 306.

(3) Step III, formal complaint and hearing by a hearing board, as set forth in section 307.

(4) Step IV, review of a hearing board decision, as set forth in section 308 or 309.

SEC. 305. STEP I: COUNSELING.

(a) In General.—A Senate employee alleging a violation may request counseling by the Office. The Office shall provide the employee with all relevant information with respect to the rights of the employee. A request for counseling shall be made not later than 180 days after the alleged violation forming the basis of the request for counseling occurred. No request for counseling may be made until 10 days after the first Director begins service pursuant to section 303(b)(4).

(b) Period of Counseling.—The period for counseling shall be 30 days unless the employee and the Office agree to reduce the period. The period shall begin on the date the request for counseling is received.

(c) Employees of the Architect of the Capitol and Capitol Police.—In the case of an employee of the Architect of the Capitol or an employee who is a member of the Capitol Police, the Director may refer the employee to the Architect of the Capitol or the Capitol Police Board for resolution of the employee's complaint through the internal grievance procedures of the Architect of the Capitol or the Capitol Police Board for a specific period of time, which shall not count against the time available for counseling or mediation under this title.

SEC. 306. STEP II: MEDIATION.

(a) In General.—Not later than 15 days after the end of the counseling period, the employee may file a request for mediation with the Office. Mediation may include he Office, the employee, and the employing office in a process involving meetings with the parties separately or jointly for the purpose of resolving the dispute between the employee and the employing office.

(b) Mediation Period.—The mediation period shall be 30 days beginning on the date the request for mediation is received and may be extended for an additional 30 days at the discretion of the Office. The Office shall notify the employee and the head of the employing office when the mediation period has ended.

SEC. 307. STEP III: FORMAL COMPLAINT AND HEARING.

(a) Formal Complaint and Request for Hearing.—Not later than 30 days after receipt by the employee of notice from the Office of the end of the mediation period, the Senate employee may file a formal complaint with the Office. No complaint may be filed unless the employee has made a timely request for counseling and has completed the procedures set forth in sections 305 and 306.

(b) Hearing Board.—A board of 3 independent hearing officers (referred to in this title as "hearing board"), who are not Senators or officers or employees of the Senate, chosen by the Director (one of whom shall be designated by the Director as the presiding hearing officer) shall be assigned to consider each complaint filed under this section. The Director shall appoint hearing officers after considering any candidates who are recommended to the Director by the Federal Mediation and Conciliation Service, the Administrative Conference of the United States, or organizations composed primarily of individuals experienced in adjudicating or arbitrating personnel matters. A hearing board shall act by majority vote.

(c) Dismissal of Frivolous Claims.—Prior to a hearing under subsection (d), a hearing board may dismiss any claim that it finds to be frivolous.

(d) Hearing.—A hearing shall be conducted—

(1) in closed session on the record by a hearing board;

(2) no later than 30 days after filing of the complaint under subsection (a), except that the Office may, for good cause, extend up to an additional 60 days the time for conducting a hearing; and

(3) except as specifically provided in this title and to the greatest extent practicable, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code.

(e) Discovery.—Reasonable prehearing discovery may be permitted at the discretion of the hearing board.

(f) Subpoena.—

(1) Authorization.—A hearing board may authorize subpoenas, which shall be issued by the presiding hearing officer on behalf of the hearing board, for the attendance of witnesses at proceedings of the hearing board and for the production of correspondence, books, papers, documents, and other records.

(2) Objections.—If a witness refuses, on the basis of relevance, privilege, or other objection, to testify in response to a question or to produce records in connection with the proceedings of a hearing board, the hearing board shall rule on the objection. At the request of the witness, the employee, or employing office, or on its own initiative, the hearing board may refer the objection to the Select Committee on Ethics for a ruling.

(3) Enforcement.—The Select Committee on Ethics may make to the Senate any recommendations by report or resolution, including recommendations for criminal or civil enforcement by or on behalf of the Office, which the Select Committee on Ethics may consider appropriate with respect to—

(A) the failure or refusal of any person to appear in proceedings under this or to produce records in obedience to a subpoena or order of the hearing board; or

(B) the failure or refusal of any person to answer questions during his or her appearance as a witness in a proceeding under this section. For purposes of section 1365 of title 28, United States Code, the Office shall be deemed to be a committee of the Senate.

(g) Decision.—The hearing board shall issue a written decision as expeditiously as possible, but in no case more than 45 days after the conclusion of the hearing.

The written decision shall be transmitted by the Office to the employee and the employing office. The decision shall state the issues raised by the complaint, describe the evidence in the record, and contain a determination as to whether a violation has occurred.

(h) Remedies.—If the hearing board determines that a violation has occurred, it shall order such remedies as would be appropriate if awarded under section 706 (g) and (k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5 (g) and (k)), and may also order the award of such compensatory damages as would be appropriate if awarded under section 1977 and section 1977A (a) and (b)(2) of the Revised Statutes (42 U.S.C. 1981 and 1981A (a) and (b)(2)). In the case of a determination that a violation based on age has occurred, the hearing board shall order such remedies as would be appropriate if awarded under section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)). Any order requiring the payment of money must be approved by a Senate resolution reported by the Committee on Rules and Administration. The hearing board shall have no authority to award punitive damages.

(i) Precedent and Interpretations.—Hearing boards shall be guided by judicial decisions under statutes referred to in section 302 and subsection (h) of this section, as well as the precedents developed by the Select Committee on Ethics under section 308, and other Senate precedents.

SEC. 308. REVIEW BY THE SELECT COMMITTEE ON ETHICS.

(a) In General.—An employee or the head of an employing office may request that the Select Committee on Ethics (referred to in this section as the "Committee'), or such other entity as the Senate may designate, review a decision under section 307, including any decision following a remand under subsection (c), by filing a request for review with the Office not later than 10 days after the receipt of the decision of a hearing board. The Office, at the discretion of the Director, on its own initiative and for good cause, may file a request for review by the Committee of a decision of a hearing board not later than 5 days after the time for the employee or employing office to file a request for review has expired. The Office shall transmit a copy of any request for review to the Committee and notify the interested parties of the filing of the request for review.

(b) Review.—Review under this section shall be based on the record of the hearing board. The Committee shall adopt and publish in the Congressional Record procedures for requests for review under this section.

(c) Remand.—Within the time for a decision under subsection (d), the Committee may remand a decision no more than one time to the hearing board for the purpose of supplementing the record or for further consideration.

(d) Final Decision.—

(1) Hearing board.—If no timely request for review is filed under subsection (a), the Office shall enter as a final decision, the decision of the hearing board.

(2) Select Committee on Ethics.—

(A) If the Committee does not remand under subsection (c), it shall transmit a written final decision to the Office for entry in the records of the Office. The Committee shall transmit the decision not later than 60 calendar days during which the Senate is in session after the filing of a request for review under subsection (a). The Committee may extend for 15 calendar days during which the Senate is in session the period for transmission to the Office of a final decision.

(B) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, unless a majority of the Committee votes to reverse or remand the decision of the hearing board within the time for transmission to the Office of a final decision.

(C) The decision of the hearing board shall be deemed to be a final decision, and entered in the records of the Office as a final decision, if the Committee, in its discretion, decides not to review, pursuant to a request for review under subsection (a), a decision of the hearing board, and notifies the interested parties of such decision.

(3) Entry of a final decision.—The entry of a final decision in the records of the Office shall constitute a final decision for purposes of judicial review under section 309.

(e) Statement of Reasons.—Any decision of the Committee under subsection (c) or subsection (d)(2)(A) shall contain a written statement of the reasons for the Committee's decision.

SEC. 309. JUDICIAL REVIEW.

(a) In General.—Any Senate employee aggrieved by a final decision under section 308(d), or any Member of the Senate who would be required to reimburse the appropriate Federal account pursuant to the section entitled "Payments by the President or a Member of the Senate" and a final decision entered pursuant to section 308(d)(2)(B), may petition for review by the United States Court of Appeals for the Federal Circuit.

(b) Law Applicable.—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that—

(1) with respect to section 2344 of title 28, United States Code, service of the petition shall be on the Senate Legal Counsel rather than on the Attorney General;

(2) the provisions of section 2348 of title 28, United States Code, on the authority of the Attorney General, shall not apply;

(3) the petition for review shall be filed not later than 90 days after the entry in the Office of a final decision under section 308(d);

(4) the Office shall be an "agency" as that term is used in chapter 158 of title 28, United States Code; and

(5) the Office shall be the respondent in any proceeding under this section.

(c) Standard of Review.—To the extent necessary to decision and when presented, the court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final decision if it is determined that the decision was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence. In making the foregoing determinations, the court shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. The record on review shall include the record before the hearing board, the decision of the hearing board, and the decision, if any, of the Select Committee on Ethics.

(d) Attorney's Fees.—If an employee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

SEC. 310. RESOLUTION OF COMPLAINT.

If, after a formal complaint is filed under section 307, the employee and the head of the employing office resolve the issues involved, the employee may dismiss the complaint or the parties may enter into a written agreement, subject to the approval of the Director.

SEC. 311. COSTS OF ATTENDING HEARINGS.

Subject to the approval of the Director, an employee with respect to whom a hearing is held under this title may be reimbursed for actual and reasonable costs of attending proceedings under sec-

tions 307 and 308, consistent with Senate travel regulations. Senate Resolution 259, agreed to August 5, 1987 (100th Congress, 1st Session), shall apply to witnesses appearing in proceedings before a hearing board.

SEC. 312. PROHIBITION OF INTIMIDATION.

Any intimidation of, or reprisal against, any employee by any Member, officer, or employee of the Senate, or by the Architect of the Capitol, or anyone employed by the Architect of the Capitol, as the case may be, because of the exercise of a right under this title constitutes an unlawful employment practice, which may be remedied in the same manner under this title as is a violation.

SEC. 313. CONFIDENTIALITY.

(a) Counseling.—All counseling shall be strictly confidential except that the Office and the employee may agree to notify the head of the employing office of the allegations.

(b) Mediation.—All mediation shall be strictly confidential.

(c) Hearings.—Except as provided in subsection (d), the hearings, deliberations, and decisions of the hearing board and the Select Committee on Ethics shall be confidential.

(d) Final Decision of Select Committee on Ethics.—The final decision of the Select Committee on Ethics under section 308 shall be made public if the decision is in favor of the complaining Senate employee or if the decision reverses a decision of the hearing board which had been in favor of the employee. The Select Committee on Ethics may decide to release any other decision at its discretion. In the absence of a proceeding under section 308, a decision of the hearing board that is favorable to the employee shall be made public.

(e) Release of Records for Judicial Review.—The records and decisions of hearing boards, and the decisions of the Select Committee on Ethics, may be made public if required for the purpose of judicial review under section 309.

SEC. 314. EXERCISE OF RULEMAKING POWER.

The provisions of this title, except for sections 309, 320, 321, and 322, are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate. Notwithstanding any other provision of law, except as provided in section 309, enforcement and adjudication with respect to the discriminatory practices prohibited by section 302, and arising out of Senate employment, shall be within the exclusive jurisdiction of the United States Senate.

SEC. 315. TECHNICAL AND CONFORMING AMENDMENTS.

Section 509 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12209) is amended—

(1) in subsection (a)—

(A) by striking paragraphs (2) through (5);

(B) by redesignating paragraphs (6) and (7) as paragraphs (2) and (3), respectively; and

(C) in paragraph (3), as redesignated by subparagraph (B) of this paragraph—

(i) by striking "(2) and (6)(A)" and inserting "(2)(A)', as redesignated by subparagraph (B) of this paragraph; and

(ii) by striking "(3), (4), (5), (6)(B), and (6)(C)" and inserting "(2)'; and

(2) in subsection (c)(2), by inserting ", except for the employees who are defined as Senate employees, in section 201(c)(1) of the Civil Rights Act of 1991)" after "shall apply exclusively".

SEC. 316. POLITICAL AFFILIATION AND PLACE OF RESIDENCE.

(a) In General.—It shall not be a violation with respect to an employee described in subsection (b) to consider the—

(1) party affiliation;

(2) domicile; or

(3) political compatibility with the employing office, of such an employee with respect to employment decisions.

(b) Definition.—For purposes of this section, the term "employee" means—

(1) an employee on the staff of the Senate leadership;

(2) an employee on the staff of a committee or subcommittee;

(3) an employee on the staff of a Member of the Senate;

(4) an officer or employee of the Senate elected by the Senate or appointed by a Member, other than those described in paragraphs (1) through (3); or

(5) an applicant for a position that is to be occupied by an individual described in paragraphs (1) through (4).

SEC. 317. OTHER REVIEW.

No Senate employee may commence a judicial proceeding to redress discriminatory practices prohibited under section 302 of this title, except as provided in this title.

SEC. 318. OTHER INSTRUMENTALITIES OF THE CONGRESS.

It is the sense of the Senate that legislation should be enacted to provide the same or comparable rights and remedies as are provided under this title to employees of instrumentalities of the Congress not provided with such rights and remedies.

SEC. 319. RULE XLII OF THE STANDING RULES OF THE SENATE.

(a) Reaffirmation.—The Senate reaffirms its commitment to Rule XLII of the Standing Rules of the Senate, which provides as follows:

"No Member, officer, or employee of the Senate shall, with respect to employment by the Senate or any office thereof—

"(a) fail or refuse to hire an individual;

"(b) discharge an individual; or

"(c) otherwise discriminate against an individual with respect to promotion, compensation, or terms, conditions, or privileges of employment on the basis of such individual's race, color, religion, sex, national origin, age, or state of physical handicap.".

(b) Authority To Discipline.—Notwithstanding any provision of this title, including any provision authorizing orders for remedies to Senate employees to redress employment discrimination, the Select Committee on Ethics shall retain full power, in accordance with its authority under Senate Resolution 338, 88th Congress, as amended, with respect to disciplinary action against a Member, officer, or employee of the Senate for a violation of Rule XLII.

SEC. 320. COVERAGE OF PRESIDENTIAL APPOINTEES.

(a) In General.—

(1) Application.—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of Presidential appointees.

(2) Enforcement by administrative action.—Any Presidential appointee may file a complaint alleging a violation not later than 180 days after the occurrence of the alleged violation, with the Equal Employment Opportunity Commission, or such other entity as is designated by the President by Executive Order, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission, or such

other entity as is designated by the President pursuant to this section, determines that a violation has occurred, the final order shall also provide for appropriate relief.

(3) Judicial review.—

(A) In general.—Any party aggrieved by a final order under paragraph (2) may petition for review by the United States Court of Appeals for the Federal Circuit.

(B) Law applicable.—Chapter 158 of title 28, United States Code, shall apply to a review under this section except that the Equal Employment Opportunity Commission or such other entity as the President may designate under paragraph (2) shall be an "agency" as that term is used in chapter 158 of title 28, United States Code.

(C) Standard of review.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under paragraph (2) if it is determined that the order was—

(i) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(ii) not made consistent with required procedures; or

(iii) unsupported by substantial evidence. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(D) Attorney's fees.—If the presidential appointee is the prevailing party in a proceeding under this section, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(b) Presidential Appointee.—For purposes of this section, the term "Presidential appointee" means any officer or employee, or an applicant seeking to become an officer or employee, in any unit of the Executive Branch, including the Executive Office of the President, whether appointed by the President or by any other appointing authority in the Executive Branch, who is not already entitled to bring an action under any of the statutes referred to in section 302 but does not include any individual—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) who is appointed to an advisory committee, as defined in section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.); or

(3) who is a member of the uniformed services.

SEC. 321. COVERAGE OF PREVIOUSLY EXEMPT STATE EMPLOYEES.

(a) Application.—The rights, protections, and remedies provided pursuant to section 302 and 307(h) of this title shall apply with respect to employment of any individual chosen or appointed, by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof—

(1) to be a member of the elected official's personal staff;

(2) to serve the elected official on the policymaking level; or

(3) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or legal powers of the office.

(b) Enforcement by Administrative Action.

(1) In General. —Any individual referred to in subsection (a) may file a complaint alleging a violation, not later than 180 days after the occurrence of the alleged violation with the Equal Employment Opportunity Commission, which, in accordance with the principles and procedures set forth in sections 554 through 557 of title 5, United States Code, shall determine whether a violation has occurred and shall set forth its determination in a final order. If the Equal Employment Opportunity Commission determines that a violation has occurred, the final order shall also provide for appropriate relief.

(2) Referral to State And Local Authorities. —

(A) Application. —Section 706(d) of the Civil Rights Act of 1964 (42 U.S.C. 20003-5(d)) shall apply with respect to any proceeding under this section.

(B) Definition. —For purposes of the application described in subparagraph (A), the term 'any charge filed by a member of the Commission alleging an unlawful practice' means a complaint filed under this section.

(c) Judicial Review.—Any party aggrieved by a final order under subsection (b) may obtain a review of such order under chapter 158 of title 28, United States Code. For the purpose of this review, the Equal Employment Opportunity Commission shall be an "agency" as that term is used in chapter 158 of title 28, United States Code.

(d) Standard of Review.—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law and interpret constitutional and statutory provisions. The court shall set aside a final order under subsection (b) if it is determined that the order was—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(e) Attorney's Fees.—If the individual referred to in subsection (a) is the prevailing party in a proceeding under this subsection, attorney's fees may be allowed by the court in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

SEC. 322. SEVERABILITY.

Notwithstanding section 401 of this Act, if any provision of section 309 or 320(a)(3) is invalidated, both sections 309 and 320(a)(3) shall have no force and effect.

SEC. 323. PAYMENTS BY THE PRESIDENT OR A MEMBER OF THE SENATE.

The President or a Member of the Senate shall reimburse the appropriate Federal account for any payment made on his or her behalf out of such account for a violation committed under the provisions of this title by the President or Member of the Senate not later than 60 days after the payment is made.

SEC. 324. REPORTS OF SENATE COMMITTEES.

(a) Each report accompanying a bill or joint resolution of a public character reported by any committee of the Senate (except the Committee on Appropriations and the Committee on the Budget) shall contain a listing of the provisions of the bill or joint resolution that apply to Congress and an evaluation of the impact of such provisions on Congress.

(b) The provisions of this section are enacted by the Senate as an exercise of the rulemaking power of the Senate, with full recognition of the right of the Senate to change its rules, in the same manner, and to the same extent, as in the case of any other rule of the Senate.

SEC. 325. INTERVENTION AND EXPEDITED REVIEW OF CERTAIN APPEALS.

(a) Intervention.—Because of the constitutional issues that may be raised by section 309 and section 320, any Member of the Senate may intervene as a matter of right in any proceeding under section

309 for the sole purpose of determining the constitutionality of such section.

(b) Threshold Matter.—In any proceeding under section 309 or section 320, the United States Court of Appeals for the Federal Circuit shall determine any issue presented concerning the constitutionality of such section as a threshold matter.

(c) Appeal.—

(1) In general.—An appeal may by taken directly to the Supreme Court of the United States from any interlocutory or final judgment, decree, or order issued by the United States Court of Appeals for the Federal Circuit ruling upon the constitutionality of section 309 or 320.

(2) Jurisdiction.—The Supreme Court shall, if it has not previously ruled on the question, accept jurisdiction over the appeal referred to in paragraph (1), advance the appeal on the docket and expedite the appeal to the greatest extent possible.

TITLE IV—GENERAL PROVISIONS

SEC. 401. SEVERABILITY.

If any provision of this Act, or an amendment made by this Act, or the application of such provision to any person or circumstances is held to be invalid, the remainder of this Act and the amendments made by this Act, and the application of such provision to other persons and circumstances, shall not be affected.

SEC. 402. EFFECTIVE DATE.

(a) In General. — Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

(b) Certain Disparate Impact Cases. — Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983.

TITLE V—CIVIL WAR SITES ADVISORY COMMISSION

SEC. 501. CIVIL WAR SITES ADVISORY COMMISSION.

Section 1205 of Public Law 101-628 is amended in subsection (a) by—

(1) striking "Three" in paragraph (4) and inserting "Four" in lieu thereof; and

(2) striking "Three" in paragraph (5) and inserting "Four" in lieu thereof.

Selected Bibliography on Sexual Discrimination and Sexual Harassment in the Workplace

Acken, B.T., St. Pierre, K., & Veglahn, P. (1991). Limiting sexual harassment liability: The best defense is an effective policy against harassment. *Journal of Accountancy, 171,* 42.

Adler, S.J. (1991, October 9). Lawyers advise concerns to provide precise written policy to employees. *The Wall Street Journal,* p. B1.

American Society for Training and Development (1991, November-December). Putting an end to sexual harassment in the workplace. *National Report on Human Resources,* pp. 1-3.

Baxter, R.H., Jr., & Hermle, L.C. (1991). *Sexual harassment in the workplace: A guide to the law* (3rd ed.). New York: Executive Enterprises.

Bennett-Alexander, D.D. (1988). Sexual harassment in the office. *Personnel Administrator, 33,* 174.

Bennett-Alexander, D.D. (1991). Hostile environment sexual harassment: A clearer view. *Labor Law, 42,* 131-143.

Cohen, L.P., Power, W., & Sicconolfi, M. (1991, November 4). Wall Street women: Financial firms act to curb office sexism, with mixed results. *The Wall Street Journal Marketplace,* p. A1.

Definition of harassment expanded. (1991, November). *Training: The Magazine of Human Resources Development,* pp. 13, 50.

Galen, M. (1991, October 28). Sexual harassment: Out of the shadows. *Business Week,* p. 30.

Galen, M., & Schiller, Z. (1991, March 18). Ending sexual harassment: Business is getting the message. *Business Week,* p. 98.

Garvin, S.J. (1991, June). Employer liability for sexual harassment. *HR Magazine,* pp. 101-107.

Gest, T., & Saltzman, A. (1991, October 21). Harassment: Men on trial. *U.S. News & World Report,* p. 38.

Gracy-Robertson, G., Grant, J., Richmond, E., Jr., & Woodard, M.D. (1992). *The problem of sexual harassment: A supervisor's guide.* San Diego, CA: Pfeiffer & Company.

A guide for complainants. Available from The Department of Fair Employment and Housing, State of California, 2014 T Street, #210, Sacramento, CA 95814 (Attn.: Public Information Office).

A guide for respondents. Available from The Department of Fair Employment and Housing, State of California, 2014 T Street, #210, Sacramento, CA 95814 (Attn.: Public Information Office).

Hayes, A.S. (1991, October 11). How the courts define harassment. *The Wall Street Journal,* p. B1.

Israel, D., & Duncan, B., III. (1989). Updated harassment guidelines from EEOC. *Personnel Administrator, 34,* 28.

Kiechel, W., III. (1987, September 14). The high cost of sexual harassment. *Fortune,* p. 147.

Koen, C.M., Jr. (1991). Sexual harassment claims stem from a hostile work environment. *Personnel Journal, 69,* 88.

Lissy, W.K. (1990). EEOC's guidance on sexual harassment. *Supervision, 51,* 19.

Morlacci, M. (1987, Winter). Sexual harassment law and the impact of Vinson. *Employee Relations Journal,* pp. 501-519.

Noah, T. (1991, October 28). Main effect of civil rights bill is likely to be lawsuits by women, the disabled. *The Wall Street Journal,* pp. A16, A18.

Noah, T., & Karr, A.R. (1991, November 4). What new civil rights law will mean: Charges of sex, disability bias will multiply. *The Wall Street Journal Marketplace,* pp. B1, B8.

Richmond, E., Jr. (1991). *Keys to managing cultural diversity in America's workplace: Tape manuscript and supervisor's/facilitator's workbook.* Los Angeles: A'Dorn Studios.

Rubenstein, M. (1991). Devising a sexual harassment policy. *Personnel Management, 23,* 34.

Saddler, J. (1991, November 4). What new civil rights law will mean: Small businesses will experience very big impact. *The Wall Street Journal Marketplace,* pp. B1-B2.

Saltzman, A., & Gest, T. (1991, November 18). Your new civil rights: Female, minority and disabled employees get more power to fight back. *U.S. News & World Report,* p. 93.

Segal, J.A. (1991, August). The sexlessness of harassment. *HR Magazine,* pp. 71-73.

Sexual harassment pamphlet. Available from The Department of Fair Employment and Housing, State of California, 2014 T Street, #210, Sacramento, CA 95814 (Attn.: Public Information Office).

Strom, S. (1991, October 20). Many companies assailed on sex harassment rules: Offenses persist even where policies are tough. *The New York Times,* p. 1.

Susser, P.A., & Jett, D.H. (1989, Spring). Washington scene: In a recently published notice, the EEOC has set forth its view of sexual harassment after Vinson. *Employment Relations Today,* p. 81.

Two breakthroughs for civil rights. (1991, November 11). *Business Week,* p. 190.

Verespej, M.A. (1988). "Hostile environment": It has made sexual harassment a mine field. *Industry Week, 236,* 21.

SEXUAL-HARASSMENT AWARENESS TEST

Directions: Next to each item below, circle the answer that indicates whether you think the statement is **True** or **False**.

True False 1. If an employee engages in conduct of a sexual nature in the presence of ten people, and only one person is offended, that person can complain of sexual harassment.

True False 2. Only a manager or supervisor can sexually harass an employee.

True False 3. A worker cannot sexually harass a supervisor.

True False 4. You have to actually touch or say something to an employee in order to commit an act of sexual harassment.

True False 5. If you are talking to a friend on the job about your sexual fantasies, and another employee overhears the converstion, that individual cannot complain of sexual harassment because the comment was not directed at him or her.

True False 6. An employee does not have to repeat an act of a sexual nature before it can constitute sexual harassment.

True False 7. A school can be held liable if a teacher or administrator sexually harasses a student.

True False 8. A person cannot complain about sexual discrimination or harassment from persons equal or lower than himself/herself in the organization, because a nonsupervisor cannot threaten a person's career.

True False 9. A employer can be held responsible if a customer, contractor, or other nonemployee sexually harasses an employee.

True False 10. It is all right to hug people as you welcome them to your department if you have a standard practice of greeting new people in this manner.

True False 11. Conduct of a sexual nature must create an intimidating, offensive, and hostile working environment before the conduct can constitute sexual harassment.

True False 12. It is okay for women to engage in conduct of a sexual nature on the job because they cannot offend most men.

True False 13. A worker can accuse a co-worker of sexual harassment for staring at him or her.

True False 14. The impact of sexual harassment only affects the victims.

True False 15. Women must realize that sometimes sexual harassment just comes with the job and they must learn to tolerate it.

True False 16. Before an individual can complain of sexual harassment or discrimination, he or she must have lost some tangible job benefit.

True False 17. When an individual complains of sexual harassment against a popular individual, he or she must accept the backlash from other employees.

True False 18. Sexual-harassment laws do not control employees' social lives outside the office.

True False 19. It isn't sexual harassment if you don't engage in language or physical conduct of a sexual nature or make actual sexual advances.

True False 20. In order to sexually harass a person, you must engage in conduct of a sexual nature and have the intention of unreasonably interfering with that individual's performance or creating an intimidating, hostile, or offensive environment.

True False 21. The laws on sexual discrimination and harassment protect men as well as women.

True False 22. Most sexual harassment is based on sexual advances.

True False 23. Harassment is more likely to occur in jobs traditionally held by the members of a particular sex.

True False 24. The organization can be held liable for the actions of individual supervisors or employees with regard to sexual harassment.

True False 25. If a person submits to sexual harassment and engages in a sexual act with someone from the office, he or she cannot complain about it afterward.

DO NOT LOOK AT THE ANSWERS UNTIL INSTRUCTED TO DO SO.

97

SAMPLE

ANSWERS TO TEST

1. True. That one person is protected by law from "hostile environment" sexual harassment.

2. False. Sexual harassment can occur between any persons in the workplace—co-workers, superior-subordinate, subordinate-superior, etc.

3. False. All persons are protected under the law.

4. False. Sexually oriented or discriminatory cartoons or pictures, language or conversation, leering, gestures, etc., can be offensive to individuals if they are seen or heard in the workplace, even if they are not directed specifically at those individuals.

5. False. If the conversation interferes with the individual's work performance or creates an offensive, intimidating, or hostile working environment, it is sexual harassment.

6. True. The term "repeated act" has been removed from the law; in some cases, an act does not have to be repeated to constitute sexual harassment.

7. True. Based on a Supreme Court ruling of February 26, 1992.

8. False. Even if it does not threaten a person's job, it can create a hostile working environment, which also is against the law.

9. True. If the employer has been notified of the conduct, can control it in some way, and has failed to take immediate and appropriate corrective action.

10. False. Hugging may be unwelcomed by or offensive to some persons.

11. False. It is sexual harassment if any one of these conditions exists.

12. False. Both men and women are protected under the law.

13. True. If the act creates an intimidating, hostile, or offensive working environment and if it would not have occurred had not the victim been a member of his or her particular sex.

14. False. It has been shown to impact negatively on the overall working environment, including factors such as co-workers, supervisors, scheduling, personnel strength, personal relationships, attitudes, morale, and the time it takes to do the job.

15. False. It is illegal.

16. False. Quid pro quo harassment involves tangible job benefits. However, hostile environment harassment is also illegal.

17. False. Intimidation of, or reprisal against, an employee for having exercised a right is an unlawful employment practice that may be remedied in the same manner as any other prohibited discriminatory practice.

18. True. Only at work and at social and business events sponsored by or required by work.

19. False. Any type of unwelcome conduct that is directed at an employee because of the person's sex may constitute sexual harassment. Disparate treatment based on a person's sex constitutes sexual discrimination.

20. False. It does not have to be the person's intention.

21. True. Sexual harassment can be man-to-woman, woman-to-man, woman-to-woman, or man-to-man.

22. False. Most sexual harassment is a power issue.

23. True. Sexual harassment is more likely in jobs in which one sex is in the minority. Women who hold jobs traditionally held by men are more likely to be harassed.

24. True. Employers (and, in some cases, co-workers) can be found liable for participating in or permitting sexual harassment at work. An employer can be held liable for a supervisor's harassment of an employee even though the employer was not aware of it. Supervisors are considered to be agents of the organization and have a responsibility to know and to find out if any kind of sexual discrimination is taking place.

25. False. The claim is based on whether the employee did not invite the advances, indicated that they were unwelcome, and regarded the conduct as undesirable or offensive, not on whether his or her participation was voluntary.

SAMPLE

Interview Form
SEXUAL HARASSMENT COMPLAINT

Date: _____

Claimant: _____

Claim Reported to: _____

Person Being Interviewed: _____

Description of the event or action:

When and where did the incident take place:

How did the claimant react:

Who was involved in the harassment:

Were there any witnesses and if so, who were they:

Was this an isolated incident or a recurring event:

If recurring, how many times has this happened previously:

Describe previous incidents:

Has the claimant spoken with anyone else about the incident(s):

Other comments offered by claimant:

Interviewer notes for follow-up:

PREVENTING SEXUAL HARASSMENT

An Employer's Guide For Supervisors

Developed by

October Adamson-Woods
Sylvia Zelnys

for the
Governor's Office of Affirmative Action
and Executive Department

1992

BEST COPY AVAILABLE

Why Bother with This Material?

Points to Ponder

From the Assistant Attorney General/Labor Relations office . . . .

No doubt about it, the employer pays for incidences of sexual harassment (which means, of course, the taxpayer pays for your mistakes).

There isn't a single source of information in terms of how many claims, suits or grievances are filed in any given year because the sources for reporting are multiple: BOLI, EEOC, AG, Governor's Office of Affirmative Action, Agencies, Unions, Private Counsel. Likewise, there isn't a reliable single source for tracking all the costs of sexual harassment claims. However, we do know this:

The State usually will defend a state manager **once** in the case of a claim of sexual harassment. The employer (agency = taxpayer) pays the settlement plus applicable attorney fees (including AG fees) which alone can total between $20,000-$30,000. A state manager may be terminated or removed from management service. The employer will suffer additional loss of production and morale (usually for two years). The State's Trial Division will not defend a manager if there is provable cause of "willful and malicious" intent. Private suits can sue a manager for outrageous conduct.

In one case a judge in The Dalles, who was found guilty of sending "dirty" notes to his secretary, cost the state 20/40k and the judge the same amount. The judge had to take out a second mortgage on his house to pay up.

The Civil Rights Act of 1991 now allows up to $300,000 in compensatory damages per person per incident PAID BY THE EMPLOYER.

Can your agency afford this?

TABLE OF CONTENTS

Prevention Program Components	4.32
Sample Policy	4.33
Sample Procedures	4.34
Discipline	4.35
Definition/Examples	4.36
Employer Liability	4.37
Guidelines for Employers/Supervisors	4.42
Obligations of Supervisors, Managers and Agents	4.43
Retaliation	4.44
DO's and DON'Ts for Supervisors/Managers	4.45
Personal Behavior Checklist	4.46
Dealing with a Complaint	4.47
EEOC Guidelines: Critical Interpretations	4.49

EEOC GUIDELINE

Prevention Program Components

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

CLARIFICATION

An agency or employer should take the following steps for the prevention of sexual harassment in the workforce:

1. Establish, publish and distribute a policy prohibiting sexual harassment.
2. Set up procedures for reporting and investigating sexual harassment occurrences.
3. Create disciplinary and other remedial actions.
4. Inform potential victims of how to react to sexual harassment.
5. Training suggested:

   For Employers/Supervisors
   - legal liability
   - personal liability
   - responsibilities and obligations
   - how to deal with harassment when it occurs in your workforce
   - discipline

   For All Employees
   - employer policy on sexual harassment
   - what constitutes sexual harassment
   - how to personally deal with harassment if it occurs
   - how to avoid activities that may constitute harassment
   - procedure for getting help if you've been harassed

   For Personnel Professionals
   - understanding the legal requirements
   - investigatory procedures
   - discipline and remedial actions

SAMPLE POLICY LETTER

Date

To All Employees:

It is the policy of the _____ Department that sexual harassment is unacceptable conduct in the workplace. Not only is it against the law, it violates the basic right each of us has to work in an atmosphere of personal dignity, mutual respect and a freedom from abuse of any type.

It is important to understand that sexual harassment is determined by the feelings of the person receiving the attention. Managers must be aware of the interaction among their employees and be especially sensitive to behavior which could be regarded as sexual harassment.

A supervisor may not use coercive sexual behavior, either directly or by innuendo, to control, influence, or effect the career, salary, job assignments, or working environment of an employee.

A co-worker may not participate in deliberate, repeated or unsolicited comments, gestures, or physical contacts of a sexual nature which are unwelcome and interfere with job performance.

It is not the intent of the agency to interfere with social inter-action or relationships freely entered into by department employees. However, any behavior which is unwelcome will be cause for discipline up to and including termination.

Your active involvement in controlling inappropriate behavior is essential to the organization's effort to assure that sexual harassment does not occur in the _____ Department.

_____

Director
Department
Telephone Number

SAMPLE PROCEDURES FOR DEALING WITH SEXUAL HARASSMENT IN THE WORKPLACE

1. Victim of sexual harassment comes to Personnel office to discuss the incident.

2. After discussion, Personnel will make one of two decisions (a/b):

   a. If an issue or concern is forwarded to raise awareness or to alert attention but does not require an investigation:

      1) Personnel will maintain the confidentiality of the incident and of the victim;
      2) The discussion will be documented;
      3) The victim will be asked to sign the documentation stating they specifically asked to remain confidential at this time;
      4) Personnel will offer counseling to the victim;
      5) Personnel will notify appropriate management at a level sufficient to maintain confidentiality of the victim, that a problem has come to their attention and that preventive action is necessary.
      6) Personnel will offer suggestions to management on preventive actions such as training, staff discussions on ways to address the harasser.
      7) Personnel will work with management to ensure that immediate and appropriate corrective action occurs.

   b. If an incident results in a complaint and warrants an investigation:

      1) Personnel will discuss the decision to investigate with the victim;
      2) The victim will provide Personnel with a written complaint;
      3) The persons and work unit involved will be notified and an investigation will be conducted which may result in disciplinary action;
      4) The affected persons and work unit will be instructed against punitive or retaliatory actions;
      5) Transfer requests by either the victim or the harasser will be accommodated, if possible and where appropriate, under the condition that neither are helped (higher grade position) or hurt (lower grade position) by the transfer.
      6) Sensitivity to confidentiality will be maintained but confidentiality cannot be guaranteed.

DISCIPLINE

The nature of disciplinary action taken against a perpetrator of sexual harassment is the same as that taken against an employee who has committed any other serious offense.

For employees represented by a labor union, collective bargaining agreements will include provisions for disciplinary actions up to and including dismissal. Whether specifically described or not, the principles of progressive discipline are to be applied. The level of disciplinary action taken must be appropriate to the nature and/or level of the offense. In other words, "does the punishment fit the crime?"

Similarly, treatment of employees not represented by a labor union should also follow the principles of progressive discipline. In the State of Oregon, Personnel Rules provide that some form of warning or prior discipline be effected before dismissal action is taken. Dismissal action can and should be initiated without prior warning, however, when the offense is serious enough that the employee could be expected to have known that dismissal would be logical under the circumstances. Again, the level of disciplinary action taken must be appropriate to the nature and/or level of the offense.

POSSIBLE REMEDIAL ACTIONS

- training or awareness programs
- counseling interventions
- informational staff meeting discussions
- posting sexual harassment policy in variety of work areas

DEFINITION OF SEXUAL HARASSMENT

Sexual Harassment is unwelcome comments, gestures, visuals, or physical contacts of a sexual nature when:

- It is part of an employer's or supervisor's decision to hire or fire;
- It is used to make other employment decisions such as pay, promotion, or job assignment;
- It interferes with the employee's work performance;
- It creates an intimidating, hostile, or offensive work environment.

EXAMPLES OF SUPERVISORY AND COWORKER BEHAVIOR WHICH CAN CONSTITUTE SEXUAL HARASSMENT

- Close surveillance or monitoring of an employee's movement;
- Changing an employee's hours or place of work to make him/her more accessible to the harasser;
- Overt and/or covert sexual suggestions or invitations to have sexual relations;
- Public speculation on an employee's virginity or sexual orientation;
- Suggestive "compliments" about a person's figure or clothing;
- Referring to individuals in sexist or demeaning terms ("honey", "boy", "girl", "hunk", "stud");
- Questions about an employee's private sexual life or activities;
- Negative or offensive comments, jokes or suggestions about another employee's gender or physical attributes;
- Obscene or lewd sexual comments, jokes, suggestions or innuendos;
- Sexually suggestive swearing, whistles or cat-calls;
- Physical contact such as hugging, kissing, pinching, touching;
- Display of sexually explicit literature, drawings, photographs or cartoons;
- Social invitations accompanied by discussion of performance reviews, evaluations or merit considerations;
- Talking about or calling attention to another employee's body or sexual characteristics in a negative or embarrassing way;
- Continuing certain behaviors after a co-worker has objected to that behavior.

EXAMPLES OF MANAGEMENT BEHAVIOR WHICH MAY RESULT IN LIABILITY FOR SEXUAL HARASSMENT

- Ignoring harassment performed by others and repeated acts after initial warnings;
- Laughing at, ignoring, or not taking seriously an employee who experiences sexual harassment;
- Blaming the victim of sexual harassment for causing the problem;
- Engaging in sexual joking or teasing.

EMPLOYER LIABILITY

From BOLI 1990 Civil Rights Handbook:

Employer responsibility extends beyond the actions of managers and supervisors if the employer knew, or should have known, about sexual harassment in the workplace by co- workers or customers. The employer also has the responsibility to take immediate, appropriate, and corrective action as soon as it determined that an act of sexual harassment against an employee or prospective employee has, in fact, occurred.

EMPLOYER RESPONSIBILITIES

839-07-555

(1) An employer, employment agency or labor organization (hereafter referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether:

(a) the specific acts complained of were authorized by the employer; or

(b) the specific acts complained of were forbidden by the employer; or

(c) the employer knew of or should have known of the occurrence of the specific acts complained of.

(2) An employer is responsible for acts of sexual harassment by an employee against a co-worker where the employer, its agents, or supervisory employees knew or should have known of the conduct, unless it can be shown that the employer took immediate and appropriate corrective action.

(3) An employer may be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer, its agents, or supervisory employees, knew or should have known of the conduct and failed to take immediate and appropriate corrective action. In reviewing these cases the Division will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(4) An employer may be responsible for its acts or acts of its agents, supervisory employees, or co-workers with respect to sexual harassment of an individual employee, even if the acts complained of were of the kind previously consented to by that individual employee, if the employer knew or should have known that the offended employee had withdrawn his or her consent to the otherwise offensive conduct.

WHEN IS AN EMPLOYER LIABLE FOR SEXUAL HARASSMENT?

Quid Pro Quo Harassment - (where the employer requires sexual favors in exchange for employment benefits). The employer is always held liable.

Applying general Title VII principles, an employer is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The employer is also liable in regulation of behavior of its employees that occurs outside the workplace if conducted in the course of business or otherwise within the scope of employment where the employee was purported to act or speak on behalf of the employer or where that person was aided in accomplishing the tort by the existence of the employer relationship.

EMPLOYER LIABILITY OF SUPERVISORS

Hostile Working Environments caused by supervisor. BOLI Case No. 39-90: In sexual discrimination cases the employer is strictly liable for the actions of its supervisory employees even when the supervisor works in the field and is not subject to the employer's day to day oversight. In 'hostile environment' cases, the initial inquiry should be whether the employer knew or should have known of the alleged sexual harassment. If actual or constructive knowledge exists, and if the employer fails to take immediate and appropriate corrective action, the employer would be directly liable. Most commonly an employer acquires actual knowledge through first hand observation, by the victim's internal complaint to other supervisors or managers, or by a charge of discrimination.

EMPLOYER LIABILITY TO ESTABLISH POLICY AND PROCEDURE

Employer needs to establish a policy and a procedure specifically designed to resolve sexual harassment claims. It is important that the procedure is reasonably responsive to the employee's complaint. This involves prompt investigation and corrective action. Guess v. Bethlehem Steel Corp: "The employer acts unreasonably either if it delays unduly or if the action it does take, however promptly, is not reasonably likely to prevent the misconduct from recurring."

EMPLOYER LIABILITY FOR CONDUCT BETWEEN FELLOW EMPLOYEES

With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace.

WHEN IS A SUPERVISOR PERSONALLY LIABLE FOR SEXUAL HARASSMENT?

ORS 659.030 makes it an unlawful employment practice for "any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under the Oregon Fair Employment Practices Act . "Or to attempt to do so" means "help, assist, or facilitate the commission of an unlawful employment practice, promote the accomplishment thereof, help in advancing or bring it about, or encourage, counsel or incite as to its commission".

WHAT IS POTENTIAL LIABILITY UNDER OTHER LEGAL CLAIMS?

Assault and Battery

Rogers v. Loews L'Enfant Plaza Hotel, Plaintiff's allegations that she was sexually harassed by her supervisor, that he would write notes and letters and press them into her hands, that he would pull at her hair, touch her and try to persuade her to spend the night or take a trip with him, that he continued in the course of conduct knowing that his activities and suggestions were distressful and frightened and embarrassed her, stated valid claims for assault and battery.

Infliction of Emotional Distress/Outrageous Conduct

Rogers v. Loews L'Enfant Plaza Hotel, Plaintiff's allegations that her supervisor continued his suggestions and advances even after she notified him they were unwelcome, that he excluded her from staff meetings, used abusive language, and belittled her in the presence of the staff, and did not share necessary information with her, that he told her he would "do everything in his power to have her fired" and that the company was aware of the problem and did nothing to assist her, stated valid claim for intentional infliction of emotional distress.

Invasion of Privacy

Rogers v. Loews L'Enfant Plaza Hotel, Defendant called her at home, as well as at work when he was off duty, and that he made leering comments about plaintiff's personal and sexual life to her. Although in most circumstances it is obviously not an intrusion to call someone at home, or even at his/her place of business, in this particular situation, with allegations of sexual harassment in personal, as well as professional life, the pleadings are sufficient to indicate an intrusion into a sphere from which plaintiff could reasonably expect that defendant should be excluded.

Negligence

J. v. Victory Tabernacle Baptist Church, Mother of 10 year old girl raped by church employee hired while he was on probation for aggravated sexual assault on another child stated a claim against church for negligent hiring, where she alleged the church knew or should have known of his conviction and not placed him in a job where he had contact with children in violation of the terms of his probation.

Interference with Economic Relationships

Kyriazi v. Western Electric Co., Assessing punitive damages of $1,500 each against three coworkers and two supervisors and ordering employer not to indemnify them; the coworkers shot rubber bands at the employee, speculated about her virginity, and circulated an obscene cartoon; the supervisors were aware of their conduct but ignored it.

Defamation

Grabarits v. Multnomah County, Jury award of $1,250 in general damages against supervisor and $42,500 general damages against employer on defamation claims connected with allegations employee was defamed by supervisor after declining his sexual advances.

Breach of Contract

EZ Communications, Holding that lewd comments made about the grievant by disc jockeys at the radio station where she worked justified her in walking off the job, despite the general rule that an employee must "obey and grieve" rather than resorting to "self-help": "I would find it unreasonable to require the grievant to have remained on the job after being subjected to such vile and lewd insults and be expected merely to file a grievance. These circumstances are a narrow exception to the self-help rule."

Wrongful Discharge

Lucas v. Brown & Root, Plaintiff alleged that she was fired because she would not sleep with her foreman: "What we know of the shared moral values of the people of Arkansas and the considerable clues to be found in positive law point alike to the conclusion that this complaint does state a claim. Prostitution is a crime denounced by statute. It is defined as follows: 'A person commits prostitution if in return for, or in expectation of a fee, he engages in or agrees or offers to engage in sexual activity with any other person.' It is at once apparent that the shoe fits. A woman invited to trade herself for a job is in effect being asked to become a prostitute."

PREVENTING SEXUAL HARASSMENT IN THE WORKPLACE

Guidelines for Employers and Supervisors

Sexual harassment is not "fun and games". When management does not take a stand on sexual harassment and work to implement that stand, employees take it as a signal that it's "okay to play". These signals perpetuate a hostile work environment, one which is counterproductive to the Employer's effort to develop and maintain a discrimination free environment.

Often supervisors observe either harassment or the effects of harassment and are uncertain what to do. They are uncertain as to whether the behavior was welcome or invited, and they feel powerless because no one has actually complained to them directly. This paralysis not only encourages additional harassment, it also validates the observed behavior. If employees see our lack of response as insensitivity or inaction they can make a complaint to that effect. So what are some actions a supervisor can take?

As a supervisor, you must model the expected behavior. At first it may seem awkward. You may be surprised to learn that **you** have been telling jokes that offend the sexual sensitivities of others. If so, it is critical that you stop. Your example will be the clearest and strongest message to your employees that you mean business. Monitor your behavior and begin monitoring the behavior of your work group. Then begin training others by simply remarking that their "dirty joke" may be offensive to someone and could potentially constitute sexual harassment. When employees see this direct connection from the policy to a change in your behavior, they'll understand that a change is taking place.

When you are confronted with a victim of sexual harassment, start out the discussion with a simple statement that you take the complaint and their concern seriously. Because it is a serious allegation, you must be careful to protect his/her rights as well as the rights of the alleged offender. Keep the discussion confidential. Suggest writing down a description of the incident. Contact your Personnel office or the Governor's Office of Affirmative Action. Tell the victim you will help.

If an employee comes to you to complain of harassing behavior, do not counsel this person to be more tolerant or to make allowances because "That's just the way he or she is" or, "You know he/she doesn't really mean anything by it." You are obligated to take immediate, corrective action. Tell the "old kidder" you're not kidding.

Retaliation

Hollen v. Sears, Roebuck & Co., Sexual harassment on the job from a supervisor is a forbidden discriminatory act. Retaliatory discharge of an employee for resisting such harassment is a wrongful, unconscionable and tortious act.

WHAT ARE AN EMPLOYER'S/MANAGER'S RESPONSIBILITIES UNDER FEDERAL AND STATE LAWS PROHIBITING SEXUAL HARASSMENT?

EEOC Guidelines: "An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned." An additional EEOC Memo further outlines: "An effective preventive program should include:

- an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented.

The employer should:

- affirmatively raise the subject with all supervisory and non-supervisory employees,
- express strong disapproval,
- and explain the sanctions for harassment.

The employer should also:

- have a procedure for resolving sexual harassment complaints.

The procedure should:

- be designed to encourage victims of harassment to come forward and should not require a victim to complain first to the offending supervisor.
- ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation.

PREVENTING SEXUAL HARASSMENT IN THE WORKPLACE

*Obligations of Supervisors, Managers and Agents**

- Be thoroughly familiar with your employer's sexual harassment policy and procedures.
- Know your employer's complaint process and procedures.
- Be able to identify your company/Department resources to call on for assistance.
- Take any discussion, concern or complaint about sexual harassment seriously.
- Be a model of the expected behavior.
- Be aware of what's happening in your work group; assess the work area for these behaviors; ensure the environment is harassment-free.
- Be able to direct your employee to alternate resources if the employee feels uncomfortable speaking to you directly.
- Keep any discussions confidential. Seek advice from your Personnel Office on how to proceed.
- Maintain an environment free of retaliation or punitive actions against a complainant.
- Advise your Personnel office of any and all discussions or complaints (official or unofficial).

* Agents may be outside contractors or any employee who is serving as a spokesperson or representative of the employer. Examples of agents may be a copy repair person, vending machine operator or office temps.

Retaliation

An employee who accuses you or your employer of sexual harassment (or discrimination of any kind), or who testifies against you in a hearing or court case cannot be punished, intimidated, disciplined, or otherwise harassed for doing so.

Retaliation charges filed during the investigation of an earlier charge may have more merit than the original complaint. In addition, the Agency may find its position on the original charge weakened by a supervisor's subsequent conduct.

The basic guideline for dealing with an employee after he or she has filed a discrimination charge is to treat that employee as if no charge was filed. While this may be very difficult to put into practice, it is your best protection against retaliation or intimidation charges. Anything even **appearing** to be done to punish the employee for making the charge while it is being investigated may be interpreted as retaliation by the employee (and the Court). Discharge of an employee making complaints may result in a case of wrongful discharge similar to the case in *Hollen v. Sears, Roebuck.*

While it is important not to cut off normal communications with the employee, it is in your best interest **not** to discuss the discrimination charge. Avoid any jokes or comments which you may consider tension-relievers, but which the employee may see as further evidence of discrimination and which can be used in Court. In short, continue to follow good personnel practices.

These guidelines apply for supervising an employee who has filed a discrimination charge whether the charge is specifically against you or is a charge against the employer.

PREVENTING SEXUAL HARASSMENT

Some "DOs" and "DON'Ts" For Supervisors and Managers

DO

- Take positive action to address issues of sexual harassment before they occur.
- Make clear to supervisors, managers and other employees what sexual harassment is, and that you will not tolerate it.
- Designate, and make known, a person or office in your organization where employees can bring their concerns and/or complaints about sexual harassment.
- Publish the options available to staff who feel they are victims of sexual harassment.
- Promptly and thoroughly inquire, even if you're not going to conduct a formal investigation, into any complaint or even suspicion of possible sexual harassment.
- Keep written records showing the reasons for employment-related decisions.
- Provide leadership by example in applying and promoting high standards of integrity, conduct and concern for all employees.
- Ensure that all employees are trained in the prevention of sexual harassment.
- Be observant of language and behavior of fellow supervisors and managers, and "call" them on what may be perceived as sexual harassment.

DON'T

- Permit sexual jokes, teasing or innuendo to become a routine part of the work environment.
- Allow employment decisions to be made on the basis of **any** reasons other than merit.
- Allow social behavior to become confused with behavior in the workplace.

PERSONAL BEHAVIOR CHECKLIST

Maintaining a work environment free from any behavior which creates discomfort for members of the work group is critical for maximum productivity, team work and high morale.

Consider personal behavior using the following checklist:

1. _____ Does this behavior contribute to work output and the accomplishment of my organization's mission and goals?
2. _____ Could this behavior offend or hurt other members of the work group subjected to it?
3. _____ Could this behavior be misinterpreted as intentionally hurtful or harassing?
4. _____ Could this behavior be sending out signals that invite harassing behavior on the part of others?
5. _____ Could this behavior be perceived by someone in the work group as offensive or intimidating?
6. _____ Would I want my behavior to be the subject of a column in the newspaper or on the evening news?
7. _____ Would I behave the same way if my partner were standing next to me?
8. _____ Would I want someone else to act this way toward my partner?

Generally speaking...**When in doubt, DON'T**

If there is **any** question in your mind whether or not a comment, gesture or behavior has the potential for being misunderstood or misinterpreted as discriminatory or harassing, don't say/do it.

DEALING WITH A SEXUAL HARASSMENT COMPLAINT

Some "Do's" and "Don'ts" for Supervisors and Managers

If an employee complains to you about sexual harassment:

DO

- Take the employee seriously, right from the start.
- Contact your organization's discrimination/harassment resource person before conducting fact finding or taking corrective action.
- Encourage the employee to talk specifically. Ask "What brought you here?" or "Please describe the last situation."
- Get all the facts. Find out exactly what happened. Don't make assumptions about what the employee means. Ask questions like:

  "Where did the behavior occur?"

  "Who was involved?"

  "Were there any witnesses?"

  "Did you talk with anyone else about what happened?"

  "Has this happened before?"

  "How long has this been going on?"

  "Did you tell this person the behavior was unwelcome?"

  "What was the person's reaction?"

- Listen and ask the employee what action he/she wants to take. The employee may only want to talk with someone about their concerns, or get more information about their rights.

- Remember that you must take action to make sure the alleged unwelcome behavior stops, even if the employee says he or she doesn't want you to.

- Encourage the harassed employee to say "no" to the offender. Frequently the inappropriate behavior can be stopped this way.

- Treat the offender's behavior as any other serious misconduct by following the progressive counseling/disciplinary process.

- Take immediate action to correct and stop the inappropriate behavior. Most suits are filed as a last resort because the employee was unable to get the harassment stopped.

DON'T

- Tell the employee to ignore the behavior. Seventy-five percent of these situations get worse when ignored.

- Assume the victim is at fault, or "asked for it".

- Joke about, discount or make light of the situation or the victim.

- Ask "why" questions such as, "Why didn't you do something about this before?" "Why" questions are often perceived as judgmental, implying the victim did something wrong.

- Ask leading questions like, "Would you want to continue working here if he/she continues this behavior?"

- Ask multiple choice questions such as, "Did he touch you on the arm, shoulder or the face?" Instead ask, "Where did the person touch you?" or "Can you be more specific about how the person touched you?"

- Let the behavior continue -- **IT IS ILLEGAL.**

EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

Critical Interpretations for Employers

Josephine Hawthorne
Assistant Attorney General
November, 1991

GUIDELINES ON DISCRIMINATION BECAUSE OF SEX

SEXUAL HARASSMENT

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.* Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonable interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

CLARIFICATION

This means:

1. You can't hire or fire someone on the basis that they submit to or reject sexual harassment.

2. You can't make submission to sexual harassment a condition for any employment decision, i.e., making job assignments, giving awards, allowing a person to go to training, etc.

3. You can't conduct, or allow to be conducted, such harassing behaviors that interfere with a person's productivity or that creates a hostile, intimidating or offensive work environment.

EEOC GUIDELINE

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

CLARIFICATION

This means:

That the EEOC, as an investigative agency, will review the facts of the entire incident before reaching its conclusion as to whether the employer has maintained a sexually harassing environment. Thus, one isolated incident of sexually harassing behavior from either a supervisor or coworker may not be considered sexual harassment unless it is a severe incident. Thus, one sexually explicit joke or comment may not create a sexually harassing environment while a severe verbal or physical sexual attack may be enough to result in liability. In addition, if an employer acts to remedy the incident, such as disciplining the offender, the Commission will consider this action in evaluating the employer's liability.

EEOC GUIDELINE

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

CLARIFICATION

This means:

that the EEOC imposes strict liability upon employers for sexual harassment by supervisors and/or agents of the employer. The employer is liable regardless of whether the employer knew or should have known about the occurrence of sexual harassment.

Additionally, supervisors or other employer agents who engage in harassment, or who know of its occurrence and do not take immediate corrective action may be held personally liable and are thus subject to lawsuit.

The court reasons that individuals cannot act themselves to deprive or permit the deprivation of the rights of their fellow citizens.

Thus, when a group of coworkers subjected a newly hired female coworker to activity of a sexually harassing nature, not only was each coworker liable for his own acts, but also each supervisor, who knew of the activity and failed to stop it, became liable. All employees were sued by the female coworker.

EEOC GUIDELINE

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

CLARIFICATION

This means:

the agency and its supervisors or agents are liable for sexual harassment occurring among co-employees. Co-employee harassment causes the hostile or offensive work environment forbidden under Title VII. If, however, the employer acts to stop the sexually harassing behavior through appropriate discipline of the harassing coworker, the Commission and the Courts will relieve the employer of its liability. Thus, the employer can protect itself by ensuring that workers who sexually harass coworkers are appropriately disciplined. This policy encourages employers to handle complaints of sexual harassment in-house and "resolve them" there. Failure to act may result in liability for the employer and the supervisor. In short, the employer cannot condone sexually harassing activity except at its own risk.

The bottom line is: If you suspect there's sexual harassment occurring between co- employees, investigate. Don't ignore it. You are mandated to take immediate and corrective action.

EEOC GUIDELINE

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

CLARIFICATION

This means:

a situation can occur where an employee is harassed by members of the public such as customers. If the employer has some control over the non-employee, then the employer may be liable. An EEOC ruling on employer liability for the harassing acts of nonemployees held the employer liable to a plaintiff waitress who was subjected to grabbing and sexually implicit remarks by a customer who knew the owner. The waitress complained to the owner and requested not to be assigned to wait on the customer in the future. The owner fired the waitress after being informed that she had consulted a lawyer concerning her rights. The EEOC explicitly found the employer was notified of the harassment and failed to take corrective measures which were reasonably requested.

Example: A female OR-OSHA inspector goes to inspect a private sector Oregon company for safety compliance. During the course of her work, she is subjected to sexually harassing and offensive behavior by employees of that company. The inspector needs to report the behavior to her OR-OSHA management immediately. OR-OSHA management is responsible for 1) providing a harassment/hostile-free work environment for its employees and 2) for taking immediate corrective action i.e., in this instance, notifying the offending employer that the offending behavior will not be tolerated. If the behavior continues during the course of other later inspections, OR-OSHA is liable for taking whatever measures it deems necessary to correct the situation to safeguard its employee.

EEOC GUIDELINE

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

CLARIFICATION

This means:

an agency or employer would take the following steps for the prevention of sexual harassment in the workforce:

1. Establish, publish and distribute a policy prohibiting sexual harassment.

2. Set up procedures for reporting and investigating sexual harassment occurrences.

3. Create disciplinary and other remedial actions.

4. Inform potential victims of how to react to sexual harassment.

5. Training which includes for employers/supervisors, legal liability, personal liability, responsibilities and obligations, why sexual harassment creates a problem in the workplace and how to deal with harassment when it occurs in the workforce; for all employees, the policy on sexual harassment, what constitutes sexual harassment, how to deal with harassment if it occurs, how to avoid activities that may constitute harassment and what the employer's procedure is for getting help in case of harassment; and for Personnel professionals, understanding the legal requirements, investigatory procedures and disciplinary/remedial actions.

EEOC GUIDELINE*

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

CLARIFICATION

This means:

that in a situation, say a promotion for example, where you have two equally qualified applicants and give the promotion to the applicant who submitted to sexual harassment, the other applicant has the right to file a complaint because they were denied an equal opportunity or benefit.

* *Federal Register*, Vol. 45, No. 218, Monday, November 10, 1980, Rules and Regulations 74677. (Title VII, Pub. L. 88-352, 78 Stat. 253)(42 U.S.C. 2000e et. seq.)(FR Doc. 80-34981 Filed 11-07-80.)